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THE
VALIDITY
OF
RATE REGULATIONS
STATE AND FEDERAL

BY
ROBERT P. REEDER
OF THE PHILADELPHIA BAR.

STANFORD 1914 1915

PHILADELPHIA
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YSAJELI OJONHATZ

PREFACE.

This book deals with the principles of constitutional law which are involved in rate regulation. It states the decisions in the rate cases themselves; and it also goes into a broader discussion of the purposes of those who placed in the Federal Constitution the provisions which bear upon rate regulation. Such a discussion is necessary in view of the condition of the authorities and the importance of the issues involved.

R. P. R.

Philadelphia, October, 1913.

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INTRODUCTORY.

Scope of chapter.

1. The Federal Constitution in the eighth section of Article I empowers Congress "to regulate commerce with foreign nations, and among the several states and with the Indian tribes." This provision we shall consider so far, though only so far, as it affects governmental regulation of railroad charges for either interstate transportation or local transportation.¹

By virtue of this provision Congress may unquestionably limit the charges for transportation which is strictly interstate.² And, on the other hand, it is clear that the states may regulate commerce which is not interstate or foreign or with the Indian tribes, for the states have all governmental powers except those of which they have been deprived by the Federal Constitution.³

But those simple statements leave unanswered several important questions. Have the states any authority over interstate rates and has Congress any authority over local rates? What are interstate rates, and what are local

¹ As to commerce with the territories see *Interstate Com. Comm. v. United States ex rel. Humboldt S. Co.* (1912) 224 U. S. 474, 32 Sup. Ct. 556, 56 L. ed. 849; *Stoutenburgh v. Hennick* (1889) 129 U. S. 141, 9 Sup. Ct. 256, 32 L. ed. 637; *Hanley v. Kansas C. S. Ry. Co.* (1903) 187 U. S. 617, 23 Sup. Ct. 214, 47 L. ed. 333; *El Paso & N. E. R. Co. v. Gutierrez* (1909) 215 U. S. 87, 30 Sup. Ct. 21, 54 L. ed. 106; *Missouri, K. & T. Ry. Co. v. Bowles* (1897) 1 Ind. Terr. 250, 40 S. W. 899. As to foreign commerce see Act June 29, 1906, secs. 1, 2, 34 U. S. Stats. at L. 584, 586; *Texas & N. O. R. Co. v. Sabine T. Co.* (1913) 227 U. S. 111, 33 Sup. Ct. 229, 57 L. ed. 442; *The Abby Dodge* (1912) 223 U. S. 166, 32 Sup. Ct. 310, 56 L. ed. 390; *United States v. Nord Deutscher Lloyd* (1912) 223 U. S. 512, 32 Sup. Ct. 244, 56 L. ed. 531; *United States v. Hamburg A. P. F. A. G.* (1911) 200 Fed. 806; *American B. Co. v. United F. Co.* (1909) 213 U. S. 347, 29 Sup. Ct. 511, 53 L. ed. 826.

² See sec. 6, *infra*.

³ This would be true even if the Tenth Amendment had never been adopted. See *The Federalist*, Nos. 32, 82; *Kansas v. Colorado* (1907) 206 U. S. 48, 89, 90, 27 Sup. Ct. 655, 664, 51 L. ed. 950.

rates? And, finally, are there any exceptions or limitations, other than those which are due to other provisions of the Constitution, to the powers of the respective governments over charges for transportation? Those are the questions which, in one form or another, we shall consider in the present chapter.

IMPLIED RESTRAINT ON THE STATES.

General principles.

2. And, first, have the states any authority over interstate commerce? Originally they had complete authority over it, but since the adoption of the Constitution Congress has had power to regulate such commerce, and, of course, when Congress exercises a power which has been granted to it by the Constitution any state law which is inconsistent with the act of Congress must give way.⁴ But if there is no federal statute which covers the matter regulated and is inconsistent with state legislation, is a state law which regulates interstate commerce unconstitutional merely because Congress has power to regulate such commerce?

It is submitted that the court should hold that the commerce clause does not prohibit state legislation under those circumstances—that a mere grant of power to the federal government does not render it unconstitutional for a state to exercise that power if the state law is not inconsistent with any federal law. In support of this position is the fact that in several cases where power is

⁴ "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." Article VI, clause 2. See also note 24, *infra*.

granted to the federal government by the Constitution there are also other provisions of the Constitution which expressly forbid the states to exercise such powers. This is true concerning the coinage of money,⁵ the granting of letters of marque and reprisal,⁶ and the making of treaties.⁷ And the powers of the states to lay duties⁸ and to engage in war⁹ are limited in express terms.¹⁰ Yet the grant to Congress of power over interstate commerce is not accompanied by any clause, except the one referring to duties on tonnage,¹¹ which prohibits the states to exercise that power over interstate commerce which they possessed before the Constitution was adopted. And the fact that it was thought necessary to state in express terms those restraints upon state action which have been named goes to show that in the absence of express restraints upon the states the powers which have been granted to Congress should be regarded as simply paramount, and it goes very far towards proving that in the absence of in-

⁵ For grant to Congress see Article I, sec. 8, cl. 5; for prohibition on states see Article I, sec. 10, cl. 1.

⁶ For grant to Congress see Article I, sec. 8, cl. 11; for prohibition on states see Article I, sec. 10, cl. 1.

⁷ The President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur:" Article II, sec. 2, cl. 2. For prohibition on states see Article I, sec. 10, cl. 1; and see also cl. 3.

⁸ For grant to Congress see Article I, sec. 8, cl. 1, which is limited, of course, by provisions in sec. 9 of that Article. For limitations on states see Article I, sec. 10, clauses, 2, 3.

⁹ For grant to Congress see Article I, sec. 8, cl. 11; for prohibition on states see Article I, sec. 10, cl. 3.

¹⁰ See also Article I, sec. 8, cl. 17, where the power of Congress to legislate for the District of Columbia is expressly declared to be exclusive.

¹¹ Article I, sec. 10, cl. 3. The provision as to "imports" in cl. 2 of that section refers only to foreign commerce: *American S. & W. Co. v. Speed* (1904) 192 U. S. 500, 24 Sup. Ct. 365, 48 L. ed. 538.

consistent federal legislation state laws upon those subjects should be sustained.¹²

Position of Supreme Court.

3. The United States Supreme Court, however, does not take this position. It declares that in some matters Congress has sole power¹³ over interstate commerce, although it admits that in other matters Congress has simply paramount power over that commerce. It holds that in some cases uniformity of regulation is essential and in those cases Congress alone may legislate, while in other instances uniformity of regulation is not essential and the states may legislate in the absence of conflicting federal legislation.¹⁴ And incidentally it holds that the court

¹² See *The Federalist*, Nos. 32, 82; and dissenting opinions of Daniel, J., and Woodbury, J., in *Passenger Cases* (1849) 7 How. 283, 497, 532, 554, 564, 12 L. ed. 702; and also the opinion of the court in *The Hamilton* (1907) 207 U. S. 398, 404, sub nom. *Old D. S. Co. v. Gilmore*, 28 Sup. Ct. 133, 134, 52 L. ed. 264.

¹³ For the sake of clearness it is better not to speak of the "exclusive" power of Congress. That word might be understood either as opposed to "concurrent," or as opposed to "paramount." And it may be added that reasons may well be advanced in support of the position that the power of Congress is more than simply concurrent, which could not be advanced in support of the position that the power is more than simply paramount.

¹⁴ See *Robbins v. Shelby Taxing Dist.* (1887) 120 U. S. 489, 492, 7 Sup. Ct. 592, 593, 30 L. ed. 694, (where the decisions in some of the earliest cases are misstated); cases there cited; cases cited in *Atlantic & P. T. Co. v. Philadelphia* (1903) 190 U. S. 160, 162, 23 Sup. Ct. 817, 47 L. ed. 995; and *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511; *Western U. T. Co. v. Kansas* (1910) 216 U. S. 1, 26, 27, 30 Sup. Ct. 190, 197, 54 L. ed. 355; *Missouri P. Ry. Co. v. Larabee F. M. Co.* (1909) 211 U. S. 612, 621, 29 Sup. Ct. 214, 217, 53 L. ed. 352; *Olsen v. Smith* (1904) 195 U. S. 332, 341, 25 Sup. Ct. 52, 53, 49 L. ed. 224; *Leisy v. Hardin* (1890) 135 U. S. 100, 109, 119, 10 Sup. Ct. 681, 684, 688, 34 L. ed. 128; *Pound v. Turck* (1877) 95 U. S. 459, 24 L. ed. 525; *West v. Kansas N. G. Co.* (1911) 221 U. S. 229, 261, 31 Sup. Ct. 564, 573, 55 L. ed. 716. Compare *Cooke, The Commerce Clause*, p. 110; *Cooke, The Pseudo-Doctrine of the Exclusiveness of the Power of Congress to Regulate Commerce*, 20 *Yale L. J.* 297; book

may determine whether matters are of such a nature that they may be regulated only by Congress.¹⁵

Reasons for position examined.

4. We must bear in mind that the court concedes that the power of Congress is in some respects simply paramount. So far as we may judge from the words of the commerce clause, though, it seems that the authority granted to it must be either always simply paramount or always vested solely in Congress. Those words themselves do not show that the clause bestows more than one kind of power upon Congress. And the court has not shown that the Constitution supports its position that the power of Congress is bifurcated.

As for the reason in support of the statement that the authority over interstate commerce is sometimes vested solely in Congress, it is doubtless true that those who adopted the Constitution thought that in some matters concerning interstate commerce uniform rules were highly desirable. But it is also doubtless true that they thought that Congress would deal with such matters, that Congress would determine whether or not a matter were such as to require uniform regulation, and that it would be congressional action rather than any judicial views as to the nature of the state legislation which would render

review in 12 Harv. L. Rev. 359.—In one of the most important cases upon the general subject which we are considering, *Cooley v. Board of Wardens* (1851) 12 How. 299, 318, 13 L. ed. 996, reference is made to the power of Congress to legislate for the District of Columbia, and that power is said to be of such a nature as to be absolutely and totally repugnant to the existence of similar power in the states. But the fact that Congress alone may legislate for the District of Columbia does not rest upon any judicial views as to the nature of the power conferred. It rests upon the express words of the Constitution.

¹⁵ See note 16, *infra*.

state legislation upon such matters invalid.¹⁶ In other words, there does not seem to be any reason for saying that the court should inquire whether uniformity of regulation is desirable. The Constitution seems to state expressly just what powers were intended to be placed solely within the control of Congress and it nowhere declares, either expressly or by necessary implication from any express provision, that the power bestowed upon Congress by the commerce clause or any part of that power is vested solely in Congress. For the court, then, to hold that state legislation which does not conflict with federal legislation is forbidden by the commerce clause seems to be entirely unwarranted.

Bearing of position upon rate regulation.

5. The fact remains, however, that the court declares that the power over interstate commerce is in some respects vested only in Congress and it is not likely that the court will reverse its position. And while such rulings ought not to be applied in cases in which it is doubtful whether they are strictly applicable, it is clear that if they are enforced at all they must have a material bearing upon state regulation of the charges for interstate transportation. Of course, such rulings are of less importance now than they were before the enactment of the Interstate Commerce Act. Where Congress has legislated state legislation which is inconsistent therewith may be declared invalid without reference to those decisions. But unless Congress has dealt with railroad rates to the full extent of its power, the rule which has been laid down in

¹⁶"The question whether or not a given subject admits of only one uniform system or plan of regulation is primarily a legislative question, not a judicial one:" Thayer, Cases on Constitutional Law, 2190, note.

those decisions even to-day requires serious consideration.¹⁷

INTERSTATE RATES.

General principles.

6. The Supreme Court has decided repeatedly that Congress may limit the charges for interstate transportation. This position has been shown not only by its enforcement of the Anti-trust Act,¹⁸ which indirectly regulates charges, but also by its enforcement of the provisions of the Interstate Commerce Act ¹⁹ and by its decisions

¹⁷ Compare the authorities cited in sec. 9, *infra*, wherein the effect of the rule whose validity we have just considered is modified by a rule of doubtful consistency with it.

¹⁸ For example, in *United States v. Union P. R. Co.* (1912) 226 U. S. 61, 470, 33 Sup. Ct. 53, 162, 57 L. ed. 124; *United States v. Terminal R. Assn. of St. Louis* (1912) 224 U. S. 383, 32 Sup. Ct. 507, 56 L. ed. 810; *Northern S. Co. v. United States* (1904) 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679; *United States v. Joint T. Assn.* (1898) 171 U. S. 505, 19 Sup. Ct. 25, 43 L. ed. 259; *United States v. Trans-Missouri F. Assn.* (1897) 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007. See also *United States v. Lake S. & M. S. Ry. Co.* (1912) 203 Fed. 295.

¹⁹ See, in addition to the cases referred to later on, the following cases in which that Act was enforced but which did not turn upon the question whether or not the commerce was interstate: *Morrisdale C. Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 304, 33 Sup. Ct. 938, 57 L. ed. 1494; *Illinois C. R. Co. v. Henderson E. Co.* (1913) 226 U. S. 441, 33 Sup. Ct. 176, 57 L. ed. 290; *Kansas C. S. Ry. Co. v. Albers Comn. Co.* (1912) 223 U. S. 573, 32 Sup. Ct. 316, 56 L. ed. 556; *United States v. Miller* (1912) 223 U. S. 599, 32 Sup. Ct. 323, 56 L. ed. 568; *Galveston, H. & S. A. Ry. Co. v. Wallace* (1912) 223 U. S. 481, 32 Sup. Ct. 205, 56 L. ed. 516; *Interstate Com. Comn. v. Union P. Ry. Co.* (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308; *Union P. Ry. Co. v. Updike G. Co.* (1911) 222 U. S. 215, 32 Sup. Ct. 39, 56 L. ed. 171; *United States v. Lehigh V. R. Co.* (1911) 220 U. S. 257, 31 Sup. Ct. 387, 55 L. ed. 458; *Louisville & N. R. Co. v. Mottley* (1911) 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297; *Chicago, I. & L. Ry. Co. v. United States* (1911) 219 U. S. 486, 31 Sup. Ct. 272, 55 L. ed. 305; *Interstate Com. Comn. v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946; *Interstate Com. Comn. v. Chicago, B. & Q. R. Co.* (1910) 218 U. S. 113, 30 Sup. Ct. 660, 54 L. ed. 959; *American Ex. Co. v. United States* (1909) 212 U. S. 522, 29 Sup. Ct. 315, 53 L. ed. 635;

that state legislation which regulates interstate commerce is unconstitutional because the power to regulate such commerce has been granted to the federal government.

Instances of interstate rates.

7. Thus, the court has held that the act of Congress which regulates interstate commerce applies when a series of railroads carrying under a joint arrangement charges more for carrying from a point outside a state to one point within the state than to a more distant point within the same state.²⁰ Upon the ground that governmental power to make such regulations rests only in the federal government, it has decided that a state may not limit the

United States v. New Y. C. & H. R. R. Co. (1909) 212 U. S. 509, 29 Sup. Ct. 313, 53 L. ed. 629; *New Y. C. & H. R. R. Co. v. United States* (1909) 212 U. S. 500, 29 Sup. Ct. 309, 53 L. ed. 624; *New Y. C. & H. R. R. Co. v. United States* (1909) 212 U. S. 481, 29 Sup. Ct. 304, 53 L. ed. 613; *Armour P. Co. v. United States* (1908) 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681; *Texas & P. Ry. Co. v. Cisco Oil Mill* (1907) 204 U. S. 449, 27 Sup. Ct. 358, 51 L. ed. 562; *Texas & P. Ry. Co. v. Abilene C. O. Co.* (1907) 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553; *Interstate Com. Comm. v. Baird* (1904) 194 U. S. 25, 24 Sup. Ct. 563, 48 L. ed. 860; *Wight v. United States* (1897) 167 U. S. 512, 17 Sup. Ct. 822, 42 L. ed. 258. And see *Southern P. T. Co. v. Interstate Com. Comm.* (1911) 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310; *Second Employers' Liability Cases—Mondou v. New Y., N. H. & H. R. Co.* (1912) 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327.

²⁰ *Louisville & N. R. Co. v. Behlmer* (1900) 175 U. S. 648, 20 Sup. Ct. 209, 44 L. ed. 309; *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Com. Comm.* (1896) 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935. See also note 37, *infra*, and *Missouri, K. & T. Ry. Co. v. New E. M. Co.* (1909) 80 Kan. 141, 101 Pac. 1011; *Commonwealth v. Peoples Ex. Co.* (1909) 201 Mass. 564, 88 N. E. 420; *United States v. Vacuum Oil Co.* (1908) 158 Fed. 533; *Corcoran v. Louisville & N. R. Co.* (1907) 125 Ky. 634, 101 S. W. 1185; *United States v. Standard Oil Co.* (1907) 155 Fed. 305; *United States v. Seaboard Ry. Co.* (1897) 82 Fed. 563. Compare *Allen & Lewis v. Oregon R. & Nav. Co.* (1901) 106 Fed. 265, 269.—In *Interstate Com. Comm. v. Reichmann* (1906) 145 Fed. 235, it was held that Congress may regulate the charges for the use of cars which are used for interstate transportation but which are not owned by any railroad company.

rates for carrying even between stations within its territory when a part of the route is outside the state,²¹ and that a state may not limit the charge for carrying goods from a point within the state to another point within that state and there placing the goods on board a ship in preparation for their transportation out of the state, and this is true even though at the time when the goods are tendered to the railroad for transportation no decision has

²¹ *Hanley v. Kansas C. S. Ry. Co.* (1903) 187 U. S. 617, 23 Sup. Ct. 214, 47 L. ed. 333. See also *St. Louis & S. F. Ry. Co. v. State* (1908) 87 Ark. 562, 113 S. W. 203; *United States v. Erie R. Co.* (1909) 166 Fed. 352; *Mires v. St. Louis & S. F. R. Co.* (1908) 134 Mo. App. 379, 114 S. W. 1052; *Hunter v. Charleston & W. C. Ry. Co.* (1908) 81 S. C. 169, 62 S. E. 13; *Frasier v. Charleston & W. C. Ry. Co.* (1908) 81 S. C. 162, 62 S. E. 14; *United States v. Delaware, L. & W. R. Co.* (1907) 152 Fed. 269; *Cowden v. Pacific C. S. Co.* (1892) 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221; note in 28 L. R. A. N. S. 985. Compare *Ewing v. Leavenworth* (1913) 226 U. S. 464, 33 Sup. Ct. 157, 57 L. ed. 303; *Hardwick F. E. Co. v. Chicago, R. I. & P. Ry. Co.* (1910) 110 Minn. 25, 124 N. W. 819; *St. Louis & S. F. R. Co. v. Hadley* (1909) 168 Fed. 317; *Dugan v. State* (1890) 125 Ind. 130, 25 N. E. 171, 9 L. R. A. 321; *Cooke, The Commerce Clause*, p. 58, note. And see *Pacific C. S. Co. v. Board of R. Comrs.* (1883) 18 Fed. 10, 9 Saw. 253, cited with approval in the *Hanley* case, *supra*, which holds that a state may not regulate rates for carrying between two places within its borders by a boat which goes upon the high seas. As to the power of Congress to regulate charges for carrying between two places within the same state upon a waterway which is entirely within the state, but which connects with the ocean, see p. 42, *infra*.—Justice Woodbury said in his separate opinion in *Passenger Cases* (1849) 7 How. 283, 559, 12 L. ed. 702, "So far as reasons exist to make the exercise of the commercial power exclusive, as on matters of exterior, general and uniform cognizance, the construction may be proper to render it exclusive, but no further, as the exclusiveness depends in this case wholly on the reasons, and not on any express prohibition, and hence cannot extend beyond the reasons themselves. Where they disappear, the exclusiveness should halt. In such case, emphatically, *cessante ratione, cessat et ipsa lex*." If this is true, the decision in *Hanley v. Kansas C. S. Ry. Co.* seems to be incorrect. If the state attempted to regulate the running of trains over the entire course, the route might be material and it might be said that the state was interfering with interstate matters. But with regard to the question of rates it seems that the route is not material, and where the transportation is between two points within the same state the rates affect only persons within that state and are in general only a local matter.

been reached as to their ultimate destination.²² And before any federal statute on the subject had been enacted, the court decided that a state may not interfere with the rates when one of the termini is beyond the jurisdiction of the state, declaring unconstitutional a statute which forbade a railroad carrying to a place outside the state to charge more from one point within its borders than from a more distant point within its borders.²³ It is a matter of course that since the passage of the interstate commerce law a state may not regulate the charges for interstate transportation.²⁴ Inasmuch as the interstate com-

²² *Railroad Comn. of Ohio v. Worthington* (1912) 225 U. S. 101, 32 Sup. Ct. 653, 56 L. ed. 1004. See also to the same effect *Texas & N. O. R. Co. v. Sabine T. Co.* (1913) 227 U. S. 111, 33 Sup. Ct. 229, 57 L. ed. 442.

²³ *Wabash, St. L. & P. Ry. Co. v. Illinois* (1886) 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244. On the point that even in the absence of federal action a state may not limit interstate rates, see also *Covington & C. B. Co. v. Kentucky* (1894) 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962; *St. Clair County v. Interstate S. & C. T. Co.* (1904) 192 U. S. 454, 24 Sup. Ct. 300, 48 L. ed. 518; *Northern P. Ry. Co. v. Keyes* (1898) 91 Fed. 47, 51.

²⁴ *Chicago, I. & L. Ry. Co. v. United States* (1911) 219 U. S. 486, 497, 31 Sup. Ct. 272, 275, 55 L. ed. 305; *Gulf, C. & S. F. Ry. Co. v. Hefley* (1895) 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910; *New Y. C. & H. R. R. Co. v. Board of Chosen Freeholders* (1907) 74 N. J. L. 367, 65 Atl. 860; *Kansas C. S. Ry. Co. v. Brooks* (1907) 84 Ark. 233, 105 S. W. 93; *Rosenbaum G. Co. v. Chicago, R. I. & T. Ry. Co.* (1903) 130 Fed. 46; and see *United States Constitution*, Article VI, clause 2; *St. Louis, S. F. & T. Ry. Co. v. Seale* (1913) 229 U. S. 156, 33 Sup. Ct. 651, 57 L. ed. 1129; *St. Louis, I. M. & S. Ry. Co. v. Hesterly* (1913) 228 U. S. 702, 33 Sup. Ct. 703, 57 L. ed. 1031; *McDermott v. Wisconsin* (1913) 228 U. S. 115, 132, 33 Sup. Ct. 431, 435, 57 L. ed. 754; *Michigan C. R. Co. v. Vreeland* (1913) 227 U. S. 59, 66, 33 Sup. Ct. 192, 194, 57 L. ed. 417; *Northern S. Co. v. United States* (1904) 193 U. S. 197, 333, 24 Sup. Ct. 436, 455, 48 L. ed. 679; *Missouri, K. & T. Ry. Co. v. Haber* (1898) 169 U. S. 613, 626, 18 Sup. Ct. 488, 493, 42 L. ed. 878.—Where destination is at state boundary line, see *Scammon v. Kansas C., St. J. & C. B. R. Co.* (1890) 41 Mo. App. 194; and where destination is just outside the state, see *Railroad Co. v. Maryland* (1874) 21 Wall. 456, 22 L. ed. 678, with interpretation in *Covington & C. B. Co. v. Kentucky* (1894) 154 U. S. 204, 210, 14 Sup. Ct. 1087, 1089, 38 L. ed. 962. It is, nevertheless, unlikely that Maryland could at the present time directly regulate fares between Baltimore and Washington. In connection with *Railroad Co. v. Maryland*,

merce act applies to all ferries used or operated in connection with any railroad, a state may not regulate the charges for transportation on an interstate ferry even when the transportation is not in connection with railroad transportation.²⁵

Legislation and the common law.

8. Before that statute was enacted, the common law rule that charges for transportation must be reasonable²⁶ was in full force and might have been invoked in the state courts even with regard to interstate transportation;²⁷ but since the passage of that statute redress can be obtained only in the manner prescribed by it.²⁸

State laws "affecting but not regulating" interstate commerce.

9. While the silence of Congress would not authorize a

see *Western U. T. Co. v. Chiles* (1907) 107 Va. 60, 57 S. E. 587, where, it will be observed, the decision is not based on *Western U. T. Co. v. James* (1896) 162 U. S. 650, 16 Sup. Ct. 934, 40 L. ed. 1105.

²⁵ *New Y. C. & H. R. R. Co. v. Board of Chosen Freeholders* (1913) 227 U. S. 248, 33 Sup. Ct. 269, 57 L. ed. 499. Compare 23 Harv. L. Rev. 484.

²⁶ See note 14 in Chapter 2, *infra*.

²⁷ See *Texas & P. Ry. Co. v. Abilene C. O. Co.* (1907) 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553; *Western U. T. Co. v. Call P. Co.* (1901) 181 U. S. 92, 21 Sup. Ct. 561, 45 L. ed. 765; and also *Cooke, Commerce Clause*, p. 116; *Rose, Code of Federal Procedure*, sec. 13; *Western U. T. Co. v. Commercial M. Co.* (1910) 218 U. S. 406; 31 Sup. Ct. 59, 54 L. ed. 1088.

²⁸ *Texas & P. Ry. Co. v. Abilene C. O. Co.* (1907) 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553. See also *Morrisdale C. Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 304, 33 Sup. Ct. 938, 57 L. ed. 1494; *Robinson v. Baltimore & O. R. Co.* (1912) 222 U. S. 506, 32 Sup. Ct. 114, 56 L. ed. 288; *Baltimore & O. R. Co. v. United States* (1910) 215 U. S. 481, 30 Sup. Ct. 164, 54 L. ed. 292; *Southern Ry. Co. v. Tift* (1907) 206 U. S. 428, 27 Sup. Ct. 709, 51 L. ed. 1124. Compare *Mitchell C. & C. Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 247, 33 Sup. Ct. 916, 57 L. ed. 1472; *Pennsylvania R. Co. v. International C. M. Co.* (1913) 230 U. S. 184, 33 Sup. Ct. 893, 57 L. ed. 1446; *Galveston, H. & S. A. Ry. Co. v. Wallace* (1912) 223 U. S. 481, 32 Sup. Ct. 205, 56 L. ed. 516; *Louisville & N. R. Co. v. Cook B. Co.* (1912) 223 U. S. 70, 32 Sup. Ct. 189, 56 L. ed. 355.

state to regulate the charges for interstate transportation, yet in that event a state might enact laws affecting such commerce but not regulating it within the meaning of the Constitution.²⁹ Before the passage of the Interstate Commerce Act a state might have required its railroads to publish their interstate rates,³⁰ and to carry goods at the published rates,³¹ or to carry at the rates named in the bills of lading.³² But since the passage of that act, which requires railroads to carry at the rates of which schedules have been filed with the Interstate Commerce Commission and given to the agents of the carriers,³³ a state

²⁹ See *Hall v. De Cuir* (1877) 95 U. S. 485, 490, 24 L. ed. 547; *Kidd v. Pearson* (1888) 128 U. S. 1, 23, 9 Sup. Ct. 6, 11, 32 L. ed. 346; *Railroad Co. v. Fuller* (1873) 17 Wall. 560, 568, 21 L. ed. 710; *Martin v. Pittsburg & L. E. R. Co.* (1906) 203 U. S. 284, 27 Sup. Ct. 100, 51 L. ed. 284; *Michigan C. R. Co. v. Vreeland* (1913) 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417; *Adams Ex. Co. v. Croninger* (1913) 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314; *Missouri P. Ry. Co. v. Castle* (1912) 224 U. S. 541, 32 Sup. Ct. 606, 56 L. ed. 875; *Southern Ry. Co. v. Reid* (1912) 222 U. S. 424, 32 Sup. Ct. 140, 56 L. ed. 257; *Martin v. West* (1911) 222 U. S. 191, 32 Sup. Ct. 42, 56 L. ed. 159; *Western U. T. Co. v. Crovo* (1911) 220 U. S. 364, 31 Sup. Ct. 399, 55 L. ed. 498; *Southern Ry. Co. v. King* (1910) 217 U. S. 524, 30 Sup. Ct. 594, 54 L. ed. 868; *Atlantic C. L. R. Co. v. Mazursky* (1910) 216 U. S. 122, 30 Sup. Ct. 378, 54 L. ed. 411; *Missouri P. Ry. Co. v. Larabee F. M. Co.* (1909) 211 U. S. 612, 29 Sup. Ct. 214, 53 L. ed. 352; *Mobile, J. & K. C. R. Co. v. Mississippi* (1908) 210 U. S. 187, 28 Sup. Ct. 650, 52 L. ed. 1016. Compare *Brown v. Houston* (1885) 114 U. S. 622, 630, 5 Sup. Ct. 1091, 1095, 29 L. ed. 257; *Welton v. Missouri* (1875) 91 U. S. 275, 280, 23 Sup. Ct. 347; *McNeill v. Southern Ry. Co.* (1906) 202 U. S. 543, 26 Sup. Ct. 722, 50 L. ed. 1142; *Louisville & N. R. Co. v. Hughes* (1912) 201 Fed. 727, and see the extreme position taken in *Northern P. Ry. Co. v. Washington* (1912) 222 U. S. 370, 32 Sup. Ct. 160, 56 L. ed. 237.—On local rates which affect interstate rates indirectly see sec. 11, *infra*.

³⁰ See *Railroad Co. v. Fuller* (1873) 17 Wall. 560, 21 L. ed. 710; *Stone v. Farmers' L. & T. Co.* (1886) 116 U. S. 307, 334, 6 Sup. Ct. 334, 346, 29 L. ed. 636.

³¹ *Railroad Co. v. Fuller* (1873) 17 Wall. 560, 21 L. ed. 710.

³² *Little R. & F. S. Ry. Co. v. Hanniford* (1887) 49 Ark. 291, 5 S. W. 294. See also *Gulf, C. & S. F. Ry. Co. v. Hefley* (1895) 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910.

³³ *Illinois C. R. Co. v. Henderson E. Co.* (1913) 226 U. S. 441, 33 Sup.

law which limits the carrier to the rate named in the bill of lading cannot constitutionally be applied to interstate shipments.³⁴ And, in view of the provision of the federal law which forbids interstate transportation until rates have been filed and published, penalties imposed by state law for delay in transporting interstate freight cannot be

Ct. 176, 57 L. ed. 290; *Texas & P. Ry. Co. v. Cisco Oil Mill* (1907) 204 U. S. 449, 27 Sup. Ct. 358, 51 L. ed. 562; *Kansas C. S. Ry. Co. v. Albers Comn. Co.* (1912) 223 U. S. 573, 32 Sup. Ct. 316, 56 L. ed. 556; *United States v. Miller* (1912) 223 U. S. 599, 32 Sup. Ct. 323, 56 L. ed. 568; *United States v. Vacuum Oil Co.* (1908) 158 Fed. 536; Act Feb. 4, 1887, c. 104, sec. 6, cl. 4, 24 U. S. Stat. at L. 381, re-enacted by Act Mar. 2, 1889, c. 382, sec. 1, cl. 4, 25 U. S. Stat. at L. 856, 3 Fed. Stats. An. 808, 828, 829. Compare *Santa Fe, P. & P. Ry. Co. v. Grant Bros. C. Co.* (1913) 228 U. S. 177, 188, 33 Sup. Ct. 474, 478, 57 L. ed. 787.

³⁴ *Gulf, C. & S. F. Ry. Co. v. Hefley* (1895) 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910. See also *Louisville & N. R. Co. v. Mottley* (1911) 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297; *Chicago, I. & L. Ry. Co. v. United States* (1911) 219 U. S. 486, 31 Sup. Ct. 272, 55 L. ed. 305; *St. Louis S. W. Ry. Co. v. Arkansas* (1910) 217 U. S. 136, 30 Sup. Ct. 476, 54 L. ed. 698; *Missouri, K. & T. Ry. Co. v. Harriman* (1913) 227 U. S. 657, 33 Sup. Ct. 397, 57 L. ed. 690; *Kansas C. S. Ry. Co. v. Carl*, (1913) 227 U. S. 639, 33 Sup. Ct. 391, 57 L. ed. note 24, *supra*. A shipper cannot recover damages sustained by him through a misstatement by an agent of the railroad as to the rate which would be charged: *Texas & P. Ry. Co. v. Mugg & Dryden* (1906) 202 U. S. 242, 26 Sup. Ct. 628, 50 L. ed. 1011.—It was held by a state court in Chicago, *St. L. & P. R. Co. v. Wolcott* (1895) 141 Ind. 267, 39 N. E. 451, that a state may forbid its railroads to increase the charge for carrying goods, even to another state, after the goods have been tendered for transportation. See also *Stewart v. Comer* (1897) 100 Ga. 754, 28 S. E. 461. Compare *Strough v. New Y. C. & H. R. R. Co.* (1904) 92 N. Y. App. Div. 584, 87 N. Y. Supp. 30, affirmed (1905) 181 N. Y. 533, 73 N. E. 1133; *Southern Ex. Co. v. Goldberg* (1903) 101 Va. 619, 44 S. E. 893, 62 L. R. A. 669. In the *Indiana* case the charges were increased during a delay in furnishing cars to the plaintiff which was due to discrimination against him. In the *New York* case they were increased during a delay which was not due to discrimination. The *Indiana* court seems to have taken a strong position, but it appears, however, that the Supreme Court would not sustain such a decision at the present day: see *Southern Ry. Co. v. Reid & Beam* (1912) 222 U. S. 444, 32 Sup. Ct. 145, 56 L. ed. 263, and cases there cited, wherein an extreme position is taken.

enforced where the delay was caused by the fact that the rates involved had not yet been fixed and published.³⁵

LOCAL RATES.

What are local rates?

10. As already stated, the Interstate Commerce Act applies when a series of railroads acting under a joint arrangement carries between points in different states,³⁶ and even though the final carrier of the series is a railroad company whose line is situated entirely within the state of destination the act applies to that carrier.³⁷ On the other hand, where the transportation by railroad³⁸

³⁵ *Southern Ry. Co. v. Reid* (1912) 222 U. S. 424, 32 Sup. Ct. 140, 56 L. ed. 257. See also *Southern Ry. Co. v. Reid & Beam* (1912) 222 U. S. 444, 32 Sup. Ct. 145, 56 L. ed. 263; *Southern Ry. Co. v. Burlington L. Co.* (1912) 225 U. S. 99, 32 Sup. Ct. 657, 56 L. ed. 1001.—In *Chicago, R. I. & P. Ry. Co. v. Hardwick F. E. Co.* (1913) 226 U. S. 426, 33 Sup. Ct. 174, 57 L. ed. 284; the court declared unconstitutional a state law which penalized delay in furnishing cars; and in *St. Louis, I. M. & S. Ry. Co. v. Edwards* (1913) 227 U. S. 265, 33 Sup. Ct. 262, 57 L. ed. 506; *Yazoo & M. V. R. Co. v. Greenwood G. Co.* (1913) 227 U. S. 1, 33 Sup. Ct. 213, 57 L. ed. 389, it declared unconstitutional state regulations which penalized delay in delivering cars to consignees. See also *Hampton v. St. Louis, I. M. & S. Ry. Co.* (1913) 227 U. S. 456, 33 Sup. Ct. 263, 57 L. ed. 596.

³⁶ See p. 9, *supra*.

³⁷ See authorities cited in note 20, *supra*, and note 70, *infra*. In *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Com. Comm.* (1896) 162 U. S. 184, 16 Sup. Ct. 700, 40 L. ed. 935, goods were carried under through bills by a series of railroads of which the final one was a local road which received the local rate for its part of the shorter haul and a lower sum as its share of the earnings for the longer haul. The court decided that the final carrier did not escape the provisions of the act by requesting preceding carriers not to name rates for its part of the transportation except when the goods were shipped to designated points, which did not include the terminus of the shorter haul. "Having elected to enter into the carriage of interstate freights and thus subjected itself to the control of the Commission, it would not be competent for the company to limit that control, in respect to foreign traffic, to certain points on its road and exclude other points:" 162 U. S. 192, 16 Sup. Ct. 703, 40 L. ed. 938.

³⁸ As to the power of Congress to regulate charges for carrying between

is entirely within a state, and is in no way connected with any arrangement for interstate transportation, then, even though the railroad also engages in interstate transportation,³⁹ the charge for the strictly local transportation is within the control of the state and is not within the control of Congress.⁴⁰

two places within the same state upon a waterway which is entirely within the state but which connects with the ocean, see p. 42, *infra*.

³⁹ A state may control the charges for local transportation by an interstate railroad: *Stone v. Farmers' L. & T. Co.* (1886) 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. ed. 636; *Stone v. Illinois C. R. Co.* (1886) 116 U. S. 347, 6 Sup. Ct. 348, 388, 1191, 29 L. ed. 650, overruling *Illinois C. R. Co. v. Stone* (1884) 20 Fed. 468, 475; *Farmers' L. & T. Co. v. Stone* (1884) 20 Fed. 270, upon this point. See also *Smyth v. Ames* (1898) 169 U. S. 466, 521, 522, 18 Sup. Ct. 418, 424, 42 L. ed. 819; *Missouri P. Ry. Co. v. Kansas* (1910) 216 U. S. 262, 283, 30 Sup. Ct. 330, 337, 54 L. ed. 472; *Allen v. Pullman's P. C. Co.* (1903) 191 U. S. 171, 24 Sup. Ct. 39, 48 L. ed. 134; *Erie R. Co. v. Purdy* (1902) 185 U. S. 148, 22 Sup. Ct. 605, 46 L. ed. 847; *Chesapeake & O. Ry. Co. v. Kentucky* (1900) 179 U. S. 388, 21 Sup. Ct. 101, 45 L. ed. 243; *Sands v. Manistee R. I. Co.* (1887) 123 U. S. 288, 8 Sup. Ct. 113, 31 L. ed. 149; 6 Mich. L. Rev. 158. Compare *Norfolk & W. R. Co. v. Pennsylvania* (1890) 136 U. S. 114, 119, 10 Sup. Ct. 958, 960, 34 L. ed. 394; *Western U. T. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355; *Pullman Co. v. Kansas* (1910) 216 U. S. 56, 30 Sup. Ct. 232, 54 L. ed. 378; *Ludwig v. Western U. T. Co.* (1910) 216 U. S. 146, 30 Sup. Ct. 280, 54 L. ed. 423. In the four cases last cited there were dissents.

⁴⁰ See United States Constitution, Tenth Amendment; *White, J.*, in *Employers' Liability Cases*—*Howard v. Illinois C. R. Co.* (1908) 207 U. S. 463, 464, 493, 502, 28 Sup. Ct. 141, 143, 147, 52 L. ed. 297; *Illinois C. R. Co. v. McKendree* (1906) 203 U. S. 514, 27 Sup. Ct. 153, 51 L. ed. 298; *Illinois C. R. Co. v. Edwards* (1906) 203 U. S. 531, 27 Sup. Ct. 159, 51 L. ed. 305; *Allen v. Pullman's P. C. Co.* (1903) 191 U. S. 171, 24 Sup. Ct. 39, 48 L. ed. 134; *Addyston P. & S. Co. v. United States* (1899) 175 U. S. 211, 247, 20 Sup. Ct. 96, 109, 44 L. ed. 136; *Kansas v. Colorado* (1907) 206 U. S. 46, 89, 90, 27 Sup. Ct. 655, 664, 51 L. ed. 950; *Sands v. Manistee R. I. Co.* (1887) 123 U. S. 288, 8 Sup. Ct. 113, 31 L. ed. 149; *Wabash, St. L. & P. Ry. Co. v. Illinois* (1886) 118 U. S. 557, 564, 7 Sup. Ct. 4, 7, 30 L. ed. 244; *Telegraph Co. v. Texas* (1881) 105 U. S. 460, 466, 26 L. ed. 1067; *Gibbons v. Ogden* (1824) 9 Wheat. 1, 194, 195, 6 L. ed. 23; *Cooke, Commerce Clause*, p. 42; *St. Louis & S. F. R. Co. v. Hadley* (1909) 168 Fed. 317; and cases cited in note 39, *supra*. Compare *Interstate Com. Comm. v. Goodrich T. Co.* (1912) 224 U. S. 194, 214, 215, 32 Sup. Ct. 436, 440, 441, 56 L. ed. 729; *Second Employers' Liability Cases*—*Mondou v. New Y., N. H. & H. R. Co.*

Local rates which affect interstate rates indirectly.

11. State regulations of charges for transportation which is strictly local are valid even when they have an indirect effect upon interstate rates. A long and short haul statute where both distances are within the state does not affect interstate commerce so directly as to be unconstitutional.⁴¹ The court said, "It may be that the enforcement of the state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce;

(1912) 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327; *Baltimore & O. R. Co. v. Interstate Com. Comm.* (1911) 221 U. S. 612, 31 Sup. Ct. 621, 55 L. ed. 878; 9 Col. L. Rev. 38; 21 Harv. L. Rev. at 48; sec. 25, *infra*.

⁴¹ *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 22 Sup. Ct. 95, 46 L. ed. 298. See also *Louisville & N. R. Co. v. Kentucky* (1896) 161 U. S. 677, 701, 16 Sup. Ct. 714, 723, 40 L. ed. 849, for a further discussion of the subject. And see *Henderson B. Co. v. Kentucky* (1897) 166 U. S. 150, 17 Sup. Ct. 532, 41 L. ed. 953, where an interstate bridge company was taxed on the portion of its intangible property which was within the state. "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge. The fact that the tax in question was to some extent affected by the amount of the tolls received, and therefore might be supposed to increase the rate of tolls, is too remote and incidental to make it a tax on the business transacted. This very question was decided in [*New Y., L. E. & W. R. Co. v. Pennsylvania* (1895) 158 U. S. 431, 439, 15 Sup. Ct. 896, 899, 39 L. ed. 1043] where it was said: 'It is argued that the imposition of a tax on tolls might lead to increasing them in an effort to throw their burden on the carrying company. Such a result is merely conjectural, and, at all events, too remote and indirect to be an interference with interstate commerce. The interference with the commercial power must be direct, and not the mere incidental effect of the requirement of the usual proportional contribution to public maintenance.' The only franchises treated here as the subject of taxation were those granted by the state of Kentucky:" 166 U. S. 153, 17 Sup. Ct. 533, 41 L. ed. 954. Four justices dissented.

that the interference with the commercial power of the general government to be unlawful must be direct, and not the merely incidental effect of enforcing the police powers of a state."⁴²

By regulating rates between points which are entirely within its limits a state may affect interstate rates very materially even where the effect is only indirect. It may name a local rate to a point near the border of the state which added to the rate from that point to an interstate point will be so much less than the through rate from the place of original shipment to the place of final destination that, assuming that shippers or passengers may interrupt through interstate transportation in order to secure the local rates for a portion of the distance,⁴³ the railroads will in practice be compelled to lower the rates for through interstate transportation. And yet in such cases the state may regulate the local rates, at least in the absence of federal action.⁴⁴ Or, to give another illustration, there may be two railroads which carry between two towns of the same state, one of which roads is entirely

⁴² 183 U. S. at 518, 519, 22 Sup. Ct. at 102, 46 L. ed. at 306. See also *Ames v. Union P. Ry. Co.* (1894) 64 Fed. 165, 172.

⁴³ But on this point see sec. 13 et seq., *infra*.

⁴⁴ *Minnesota Rate Cases*—*Simpson v. Shepard* (1913) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511; *Allen v. St. Louis, I. M. & S. Ry. Co.* (1913) 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. ed. 1625; *Southern P. Co. v. Campbell* (1913) 230 U. S. 537, 33 Sup. Ct. 1027, 57 L. ed. 1610; *Oregon R. & N. Co. v. Campbell* (1913) 230 U. S. 525, 33 Sup. Ct. 1026, 57 L. ed. 1604; *Chesapeake & O. Ry. Co. v. Conley* (1913) 230 U. S. 513, 33 Sup. Ct. 985, 57 L. ed. 1597; *Missouri Rate Cases*—*Knott v. Chicago, B. & Q. R. Co.* (1913) 230 U. S. 474, 33 Sup. Ct. 975, 57 L. ed. 1571. See also *Louisville & N. R. Co. v. Siler* (1911) 186 Fed. 176; *Oregon R. & N. Co. v. Campbell* (1909) 173 Fed. 957; *Perkins v. Northern P. Ry. Co.* (1907) 155 Fed. 445, 453; *Northern P. Ry. Co. v. Lee* (1912) 199 Fed. 621; *In re Arkansas Rate Cases* (1911) 187 Fed. 290; *Woodside v. Tonopah & G. R. Co.* (1911) 184 Fed. 358. Compare *Shepard v. Northern P. Ry. Co.* (1911) 184 Fed. 765; *Reynolds, Railway Valuation*—Is it a Panacea? 8 Col. L. Rev. 265.

within the state and the other of which passes outside of the state for a portion of the distance. And in this case also a federal court has held that while the state might not limit the charges of the latter road directly ⁴⁵ it may limit directly the charges of the former road although the interstate road is thereupon obliged in order to compete for the traffic to make similar rates for its own transportation between those two points.⁴⁶

Local rates which affect interstate rates directly.

12. Where, however, state regulations of intrastate charges directly affect interstate rates they are unconstitutional. Thus a state may not forbid a railroad to charge more for carrying between two points within the state than it charges for a longer interstate haul which includes the shorter route when the prohibition would have a direct effect upon interstate commerce;⁴⁷ and it may not require

⁴⁵ See sec. 7, *supra*.

⁴⁶ *St. Louis & S. F. R. Co. v. Hadley* (1909) 168 Fed. 317, 340. See also *Louisville & N. R. Co. v. Interstate Com. Comm.* (1910) 184 Fed. 118, 127; *Houston & T. C. R. Co. v. Storey* (1906) 149 Fed. 499.

⁴⁷ *Louisville & N. R. Co. v. Eubank* (1902) 184 U. S. 27, 22 Sup. Ct. 277, 46 L. ed. 416. The company was commanded to change the rate for either the local haul or the interstate haul. In the case considered the earnings from the local haul were more important. Therefore, rather than lower its local rate, the company would have raised its interstate rate, although on its so doing its competitors would have secured its interstate traffic. It seems, however, that if the local earnings had been less important than the interstate earnings the court should have held that the regulation did not violate the commerce clause, for in that case the company would have retained its interstate, and lowered its local, rate, which was probably the main result sought by the state. It seems also that if a minimum interstate rate had been fixed by the federal government, and, therefore, that rate could not have been reduced by the carrier, the long and short haul provision should have been sustained, for it would have affected only the changeable rate—that for the shorter, and not for the interstate, haul. The court lends support to this position by referring to a hypothetical case in which local rates are fixed by state statute and then saying, "Congress does not interfere with local rates by adopting their sum as the interstate rate."

a railroad to carry local traffic at inadequate rates on the ground that it is compensated by the profitableness of its interstate business.⁴⁸ But where property is used for both local and interstate transportation a railroad is entitled to earn from local transportation an income upon

These words, of course, must be read in their proper connection, for if they referred to local rates which are fixed by the carrier the dictum would be inconsistent with the decision in the case under consideration. If Congress were allowed to adopt as the interstate rate the sum of the local rates established by the carrier it might in some cases directly affect local rates, according to the present decision, and Congress may not interfere with local commerce to any greater extent than the states may interfere with interstate commerce: the Tenth Amendment is fully as much a part of the Federal Constitution as is the eighth section of Article I. (See *Kansas v. Colorado* (1907) 206 U. S. 46, 89, 90, 27 Sup. Ct. 655, 664, 51 L. ed. 950; and note 40, *supra*.) It seems, therefore, that if Congress should declare that through rates should be the sum of the local rates as fixed by the carriers, the question whether the act could constitutionally be applied should depend in each case on whether the local earnings or the interstate earnings were of more importance to the carrier. It is true that the view of the case taken in this note does not thoroughly coincide with that taken in portions of the opinion. Thus the court says, "The vice of the provision lies in the regulation of rates between points wholly within the state, by the rates which obtain between points outside of and those which are within the state." But both earlier and later in the opinion the decision is based on the effect of the regulation, and the facts of the case do not warrant reference for it for the establishment of any other test of constitutionality.—With the discussion in this note compare dicta in *Minnesota Rate Cases*—*Simpson v. Shepard* (1913) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511.

⁴⁸ *Smyth v. Ames* (1898) 169 U. S. 466, 541, 18 Sup. Ct. 418, 432, 42 L. ed. 819; *Northern P. Ry. Co. v. Keyes* (1898) 91 Fed. 47; *Morgan's L. & T. R. Co. v. Railroad Comn. of La.* (1911) 127 La. 636, 665, 53 So. 890, 900; *Seaboard A. L. Ry. Co. v. Railroad Comn. of Ala.* (1907) 155 Fed. 792, 806; *State v. Seaboard A. L. Ry.* (1904) 48 Fla. 129, 37 So. 314; and see *Minnesota Rate Cases*—*Simpson v. Shepard* (1913) 230 U. S. 352, 435, 33 Sup. Ct. 729, 755, 57 L. ed. 1511. Compare *Grand R. & I. Ry. Co. v. Osborn* (1904) 193 U. S. 17, 24 Sup. Ct. 310, 48 L. ed. 598, where the court upheld regulations based upon the entire gross earnings per mile within the state. In that case the company was estopped from denying the adequacy of the rates. In *Commissioner of Railroads v. Wabash R. Co.* (1901) 126 Mich. 113, 85 N. W. 466, (1900) 123 Mich. 669, 82 N. W. 526, which arose under the same statute, it was not contended that the local rates so fixed were inadequate when considered by themselves. Consider also *Washington S. Ry. Co. v. Commonwealth* (1911) 112 Va. 515, 520, 71 S. E. 539, 541.

only that proportion of the whole value of the property within the state which the local traffic bears to the interstate traffic.⁴⁹

**SEPARATE INTRASTATE TRANSPORTATION OF PERSONS
OR GOODS COMING FROM OR DESTINED TO
ANOTHER STATE.**

The problem.

13. But what rule of law governs where persons or goods are carried entirely within one state under a contract which relates only to that transportation but before or after that local transportation they are carried interstate? Is the charge for such local transportation subject only to state regulation, as in the case of a charge for transportation which is strictly local? Or is it subject only to federal control, as in the case of a rate which is strictly interstate? Or is it in a class by itself, subject to state control in the absence of federal action but also subject to paramount action by Congress? Or is the charge subject to the control of one government if the transportation is made under some circumstances but to the control of another government if other circumstances exist: in other words, when a carrier or a traveller or a shipper

⁴⁹ See *Minnesota Rate Cases*—*Simpson v. Shepard* (1913) 230 U. S. 352, 435, 33 Sup. Ct. 729, 755, 57 L. ed. 1511; *State v. United States Ex. Co.* (1900) 81 Minn. 87, 91, 83 N. W. 465, 466, 50 L. R. A. 667, 669; *State v. Atlantic C. L. R. Co.* (1904) 48 Fla. 146, 37 So. 657, affirmed in *Atlantic C. L. R. Co. v. Florida* (1906) 203 U. S. 256, 27 Sup. Ct. 108, 51 L. ed. 174; *State v. Seaboard A. L. Ry.* (1904) 48 Fla. 129, 144, 145, 37 So. 314, 320, affirmed in *Seaboard A. L. Ry. v. Florida* (1906) 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175; and sec. 165, *infra*. Compare *Washington S. Ry. Co. v. Commonwealth* (1911) 112 Va. 515, 520, 71 S. E. 539, 541. There are expressions in *Smyth v. Ames* (1898) 169 U. S. 466, 541, 18 Sup. Ct. 418, 432, 42 L. ed. 819, referred to in *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 267, 22 Sup. Ct. 900, 904, 46 L. ed. 1151, which, standing alone, seem inconsistent with this position, but if they are read in their proper connection the inconsistency disappears.

interrupts through transportation because of a desire to secure local rates for a part of the distance, is the power to regulate the rates within the state different from that which would exist if there were other reasons for making the local transportation under a separate arrangement?

These questions are obviously of great importance, for if either the carrier or its patron has a constitutional right to make a break in through transportation simply in order to secure local rates for part of the distance Congress is without power to regulate some charges for transportation which are in substance interstate;⁵⁰ and, on the other hand, if, where goods are produced in one state and consumed in another, every movement of those goods from the moment they are produced until they are finally consumed is to be regarded as a part of interstate transportation, Congress has power over a large amount of transportation which is in substance strictly local.⁵¹

The test.

14. In order to answer these questions it is necessary to

⁵⁰ Compare the provision of the Interstate Commerce Act, quoted in note 68, *infra*, in which railroads are forbidden to interrupt through interstate transportation for any such purpose.

⁵¹ Goods are in the course of interstate transportation "when actually started in the course of transportation to another state, or delivered to a carrier for such transportation. There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state." *Coe v. Errol* (1886) 116 U. S. 517, 525, 6 Sup. Ct. 475, 477, 29 L. ed. 715.

determine whether the two acts of transportation are in reality separate transactions. If they are entirely separate the part of the transportation which is between points within the state is subject only to state control; but if they are not in reality separate transactions both acts are subject to federal control, although in some instances at least they must be regarded as subject to state control unless and until Congress has legislated. Of course, the main difficulty is in determining whether the transactions are to be regarded as separate.

Tax and original package cases.

15. Let us first note by way of illustration two lines of cases which do not deal with rate regulation.

A state has no power to tax property within its borders which is actually in transit to another state;⁵² but, on the other hand, it may tax goods within its territory which are not in the course of continuous interstate transportation, even though they have already been transported for some distance and though it is intended that they shall be transported ultimately out of the state.⁵³

⁵² See, e. g., *Kelley v. Rhoads* (1903) 188 U. S. 1, 7, 23 Sup. Ct. 259, 262, 47 L. ed. 359.

⁵³ In *Susquehanna C. Co. v. South Amboy* (1913) 228 U. S. 665, 33 Sup. Ct. 712, 57 L. ed. 1015, it was held that a state may tax coal brought from another state and stored, while awaiting orders or means of transportation for orders already received, for further shipment to ports in other states or countries. In *Bacon v. Illinois* (1913) 227 U. S. 504, 515, 516, 33 Sup. Ct. 299, 302, 303, 57 L. ed. 615, it was held that the state might tax grain which the purchaser had placed in an elevator for inspection, grading, etc. The fact that the owner had the privilege of reshipping under the original contracts, and actually intended to forward the grain, did not render the grain immune from local taxation until it had been actually committed to the carriers for transportation. In *General Oil Co. v. Crain* (1908) 209 U. S. 211, 28 Sup. Ct. 475, 52 L. ed. 754, it was held that a law of Tennessee which provided for the inspection of oil might be enforced as to oil which had been brought from another state and which was temporarily stored in

So also, where goods have been brought from another state the state into which they have been brought may not, in the absence of federal authorization,⁵⁴ forbid their sale in the original packages;⁵⁵ yet if bulk has been broken or ownership of the goods has been transferred after the goods have entered the state, those goods are subject to the regulations which the state into which they have been brought may make concerning their sale in that state.⁵⁶

Tennessee for convenience in distribution, but which it was intended should ultimately be loaded into other receptacles and shipped to points outside the state. Have these cases any bearing upon the question whether when there is milling in transit the total transportation is in reality divided into two separate transactions? In *Coe v. Errol* (1886) 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715, the court sustained a local tax upon logs which had been cut at one place in the state and hauled to another place therein, whence the owner intended ultimately to float them to another state, upon the ground that the logs had not begun "their final movement for transportation from the state of their origin to that of their destination." See 116 U. S. 525, 527, 528, 6 Sup. Ct. 477, 478, 479, 29 L. ed. 718, 719, and note 51, *supra*. That case was followed in *Diamond M. Co. v. Ontonagon* (1903) 188 U. S. 82, 23 Sup. Ct. 266, 47 L. ed. 394. In both cases the interruption in transportation was intentionally a prolonged one. On the question whether every interruption in transportation would be similarly treated see *Bacon v. Illinois* (1913) 227 U. S. 504, 515, 516, 33 Sup. Ct. 299, 302, 303, 57 L. ed. 615; *General Oil Co. v. Crain* (1908) 209 U. S. 211, 228, 230, 28 Sup. Ct. 475, 481, 482, 52 L. ed. 754, and cases cited in that opinion; *Swift & Co. v. United States* (1905) 196 U. S. 375, 398, 399, 25 Sup. Ct. 276, 280, 49 L. ed. 518; *Johnson v. Southern P. Co.* (1904) 196 U. S. 1, 22, 25 Sup. Ct. 158, 163, 49 L. ed. 872; *Kelley v. Rhoads* (1903) 188 U. S. 1, 7, 23 Sup. Ct. 259, 262, 47 L. ed. 359; *Blackstone v. Miller* (1903) 188 U. S. 189, 203, 23 Sup. Ct. 277, 47 L. ed. 439; *Gulf, C. & S. F. Ry. Co. v. Texas* (1907) 204 U. S. 403, 413, 414, 27 Sup. Ct. 360, 363, 51 L. ed. 540; *Delaware & H. C. Co. v. Commonwealth* (1888) 1 Mona. (Pa.) 36, 42, 17 Atl. 175, 178; *Rosenbaum G. Co. v. Chicago, R. I. & T. Ry. Co.* (1903) 130 Fed. 46, 48.

⁵⁴ Yet see *In re Rahrer* (1891) 140 U. S. 545, 11 Sup. Ct. 865, 35 L. ed. 572.

⁵⁵ *Leisy v. Hardin* (1890) 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128.

⁵⁶ *Cook v. Marshall County* (1905) 196 U. S. 261, 25 Sup. Ct. 233, 49 L. ed. 471; *Austin v. Tennessee* (1900) 179 U. S. 343, 21 Sup. Ct. 132, 45 L. ed. 225; *May v. New Orleans* (1900) 178 U. S. 496, 20 Sup. Ct. 976, 44 L.

Some rates under local bills subject to federal control.

16. The court has, however, held that the Interstate Commerce Act is violated where a terminal company which is part of a railroad and steamship system gives special facilities to a shipper in the same state who ships to it under a local bill of lading goods intended ultimately for foreign transportation by another part of that system;⁵⁷ that where goods are carried under a local bill of lading between two points within a state and then placed on board a ship for transportation out of the state the transportation within the state must be regarded as part of interstate transportation and therefore not subject to state control, even though at the time when the goods are tendered for transportation no decision has been reached as to their ultimate destination;⁵⁸ and that a state may not regulate the charges for carrying between two points within its borders under a local bill of lading lumber which is from the beginning of the transportation destined for export; and this is true even though the further trans-

ed. 1165. Compare *McDermott v. Wisconsin* (1913) 228 U. S. 115, 33 Sup. Ct. 431, 57 L. ed. 754; *Adams Ex. Co. v. Kentucky* (1907) 206 U. S. 129, 27 Sup. Ct. 606, 51 L. ed. 987; *Rearick v. Pennsylvania* (1906) 203 U. S. 507, 27 Sup. Ct. 159, 51 L. ed. 295; *Heyman v. Southern Ry. Co.* (1906) 202 U. S. 270, 27 Sup. Ct. 104, 51 L. ed. 178; *Schollenberger v. Pennsylvania* (1898) 171 U. S. 1, 18 Sup. Ct. 757, 43 L. ed. 49; *Collins v. New Hampshire* (1898) 171 U. S. 30, 18 Sup. Ct. 768, 43 L. ed. 60. For further discussion of the original package question see Cooke, *The Commerce Clause*, pp. 27, 161, 253; Howland, *The Police Power and Interstate Commerce*, 4 Harv. L. Rev. 221; Trickett, *The Original Package Ineptitude*, 6 Col. L. Rev. 161; Reeder, Chief Justice Fuller, 59 U. of Pa. L. Rev. 4-7; note 64 *infra*; *The Original Package Question Resurrected Under the Pure Food Law*, 73 Cent. L. J. 165.—On the bearing of these cases on rate regulation see, however, opinion in *Gulf, C. & S. F. Ry. Co. v. Texas* (1907) 204 U. S. 403, 412, 27 Sup. Ct. 360, 362, 51 L. ed. 540.

⁵⁷ *Southern P. T. Co. v. Interstate Com. Comn.* (1911) 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310.

⁵⁸ *Railroad Comn. of Ohio v. Worthington* (1912) 225 U. S. 101, 32 Sup. Ct. 653, 56 L. ed. 1004.

portation is by another carrier and there is some necessary delay at the time of transshipment.⁵⁹

This series of cases seems to furnish a sufficient answer to the suggestion which was made in one of the earlier cases⁶⁰ that if a portion of the transportation were by a

⁵⁹ *Texas & N. O. R. Co. v. Sabine T. Co.* (1913) 227 U. S. 111, 33 Sup. Ct. 229, 57 L. ed. 442.—See also *Railroad Comn. of La. v. Texas & P. Ry. Co.* (1913) 229 U. S. 336, 33 Sup. Ct. 837, 57 L. ed. 1215.

⁶⁰ *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Com. Comn.* (1896) 162 U. S. 184, 192, 16 Sup. Ct. 700, 703, 40 L. ed. 935. There is a casual suggestion in *Texas & P. Ry. Co. v. Interstate Com. Comn.* (1896) 162 U. S. 197, 212, 16 Sup. Ct. 666, 672, 40 L. ed. 940, referred to with approval in *Armour P. Co. v. United States* (1908) 209 U. S. 56, 78, 28 Sup. Ct. 428, 434, 52 L. ed. 681, that the Interstate Commerce Act as it then stood had in view the whole field of commerce excepting commerce entirely within a state. (On the change in the punctuation of the act by the amendment of 1906, see *United States v. Colorado & N. W. R. Co.* (1907) 157 Fed. 321, 327, 15 L. R. A. N. S. 167, 173.) Yet federal courts held that the original act applied to a local railroad, of which the control or management was not in common with that of a connecting carrier to points outside the state, only when it carried under an arrangement for continuous interstate or foreign transportation: *United States v. Chicago, K. & S. R. Co.* (1897) 81 Fed. 783; *Interstate Com. Comn. v. Bellaire, Z. & C. Ry. Co.* (1897) 77 Fed. 942; *Ex parte Koehler* (1887) 30 Fed. 867; *New J. F. E. v. Central R. Co.* (1888) 2 I. C. C. 84. See also *United States v. Wood* (1906) 145 Fed. 406, 411; *United States v. Geddes* (1904) 131 Fed. 452 (1903) 180 Fed. 480. Compare *United States v. Colorado & N. W. R. Co.* (1907) 157 Fed. 321, 15 L. R. A. N. S. 167; *Corcoran v. Louisville & N. R. Co.* (1907) 125 Ky. 634, 101 S. W. 1185. There may, however, be an arrangement for interstate transportation although goods are not carried under through bills: *United States v. New Y. C. & H. R. R. Co.* (1907) 153 Fed. 630; *United States v. Seaboard Ry. Co.* (1897) 82 Fed. 563. Compare *Heiserman v. Burlington, C. R. & N. Ry. Co.* (1884) 63 Iowa, 732, 18 N. W. 903. And a local road which grants rates lower than its local rates on interstate freight received from one connecting line must, by virtue of the Interstate Commerce Act, grant the same lower rates on freight brought to it from points outside the state by another connecting line: *Augusta S. R. Co. v. Wrightsville & T. R. Co.* (1896) 74 Fed. 522. In accordance with this case it would probably be held that a local road which enters into arrangements for continuous interstate transportation for the benefit of some shippers must enter into similar arrangements for the benefit of all other shippers to the same destination. The decision is sound if analogous to that in *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Com. Comn.*, cited in note 37, *supra*; see also *Southern P. T. Co. v. Interstate Com. Comn.*, cited in note 57, *supra*.

railroad which was entirely within one state and which did not participate in any agreements for through inter-

Compare *Kentucky & I. B. Co. v. Louisville & N. R. Co.* (1889) 37 Fed. 567; *Gamble-Robinson Comm. Co. v. Chicago & N. W. Ry. Co.* (1909) 168 Fed. 161, 21 L. R. A. N. S. 962; *Louisville & N. R. Co. v. West C. N. S. Co.* (1905) 198 U. S. 483, 25 Sup. Ct. 745, 49 L. ed. 1135.—The above decisions relate to the Interstate Commerce Act. But it is important to know also the extent of the federal power. In *Pacific C. Ry. Co. v. United States* (1909) 173 Fed. 448; *United States v. Colorado & N. W. R. Co.* (1907) 157 Fed. 321, 15 L. R. A. N. S. 167; *United States v. Colorado & N. W. R. Co.* (1907) 157 Fed. 342, it is held that the federal safety appliance act applies to a railroad which is entirely within one state and which does not participate in contracts for through interstate transportation; while the contrary position is taken in *United States v. Geddes* (1904) 131 Fed. 452 (1903) 180 Fed. 480. Compare *Southern Ry. Co. v. United States* (1911) 222 U. S. 20, 32 Sup. Ct. 2, 56 L. ed. 72, discussed in sec. 25, *infra*.—In *The Daniel Ball* (1870) 10 Wall. 557, 19 L. ed. 999, a federal law requiring the inspection and licensing of vessels was applied to a vessel which carried goods coming from and goods destined to places in other states, but which did not itself leave the state nor run in connection with or continuation of any line of vessels or railway making an interstate trip. The court said that “when- ever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one state, and some acting through two or more states, does in no respect affect the character of the transaction. To the extent in which each agency acts in that trans- action, it is subject to the regulation of Congress.” The court expressly disclaimed any intention of laying down a rule concerning land transporta- tion. See also *Railroad Co. v. Maryland* (1874) 21 Wall. 456, 22 L. ed. 678; *Pullman’s P. C. Co. v. Pennsylvania* (1891) 141 U. S. 18, 23, 32, 11 Sup. Ct. 876, 878, 881, 35 L. ed. 613. Yet it is doubtful whether a different rule would be applied to railroads simply because they transport on land. *Norfolk & W. R. Co. v. Pennsylvania* (1890) 136 U. S. 114, 119, 10 Sup. Ct. 958, 960, 34 L. ed. 394, was based upon *The Daniel Ball*. The railroad, however, had made traffic contracts with other roads. See also *Diamond M. Co. v. Ontonagon* (1903) 188 U. S. 82, 92, 23 Sup. Ct. 266, 270, 47 L. ed. 394, and references in *Wabash, St. L. & P. Ry. Co. v. Illinois* (1886) 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244, to *Hall v. De Cuir* (1877) 95 U. S. 485, 24 L. ed. 547.—With *The Daniel Ball* compare *Veazie v. Moor* (1852) 14 How. 568, 14 L. ed. 545, which is cited in *Covington & C. B. Co. v. Ken- tucky* (1894) 154 U. S. 204, 210, 14 Sup. Ct. 1087, 1089, 38 L. ed. 962, as authority for the proposition that the states have sole power to regulate the navigation of waters which are entirely within one state and do not form part of a continuous water highway to a place beyond its limits, “not-

state transportation whatever, that portion of the transportation might not be subject to federal control.

Gulf, C. & S. F. Ry. Co. v. Texas.

17. So also the above cases, while in no wise calling into question the actual decision in the leading case of *Gulf, C. & S. F. Ry. Co. v. Texas*,⁶¹ show the weakness of the test of constitutionality which was relied upon by the court at that time.

In that case a dealer who had bought grain which was not then within the state, sold grain to be delivered at another point within the same state, and soon afterwards shipped the grain which he had in the meanwhile received from the other state, for that purpose securing a new bill of lading. The court held that he was entitled to transportation at the local rate. It noted that he might have performed his obligation by supplying other grain, but it laid stress upon the fact that the interstate transportation and the intrastate transportation were under separate contracts with the railroads, and declared that "In many cases it would work the greatest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract . . . The carrier ought to be able to depend upon the contract which it

withstanding the fact that the goods or passengers carried or travelling over such highway between points in the same state may ultimately be destined for other states, and, to a slight extent, state regulation may be said to interfere with interstate commerce." See also comment on *The Daniel Ball* in *Watkins*, *Shippers and Carriers of Interstate Freight*, p. 88.

⁶¹ (1907) 204 U. S. 403, 27 Sup. Ct. 380, 51 L. ed. 540.

has made, and must conform to the liability imposed by that contract.”⁶²

This opinion was prepared by a justice whose views as to the bearing of a contract between carrier and shipper upon interstate rates were not accepted by a majority of the court in a case which was decided only a year later.⁶³

Is the existence of separate contracts conclusive?

18. Indeed, considering the question simply upon principle, it seems clear that while the existence of two separate contracts for the two portions of the total transportation tends to show that there are two separate transactions, it does not show that fact conclusively,⁶⁴ for the

⁶² 204 U. S. at 414, 27 Sup. Ct. at 363, 51 L. ed. 547.—Grain had been shipped from South Dakota to Texarkana, Texas, and there delivered by the consignee to A, by surrendering to him the bill of lading. A reshipped the grain to himself at Goldthwaite, Texas, where he had contracted to deliver grain to B. The reshipment was made by surrendering the bill of lading to Texarkana and receiving in its place a new bill of lading from Texarkana to Goldthwaite. If the rate from Texarkana to Goldthwaite could be treated as part of an interstate rate the charge for transportation would be higher than if the company were limited to the rate fixed by the state commission. The company charged the higher rate and was fined by a state court for extortion, which judgment was sustained by the highest court of the state and by the Supreme Court of the United States. It may be noted, although the Supreme Court gave no weight to these facts, that neither the original consignee nor A had any warehouse at Texarkana, that the grain was not unloaded at that point, and that it remained there only five days. Compare references to reasons for this decision as given in *Texas & N. O. R. Co. v. Sabine T. Co.* (1913) 227 U. S. 111, 33 Sup. Ct. 229, 57 L. ed. 442.

⁶³ *Armour P. Co. v. United States* (1908) 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681, cited in note 65, *infra*.

⁶⁴ It may furnish a convenient working test under ordinary circumstances, but not an absolute test. Perhaps it may be regarded as somewhat like the original package rule for determining whether or not articles which have been brought into a state have become subject to the jurisdiction of that state, a convenient working rule, but one which is not always strictly applied: see Willoughby on the Constitution, pp. 644, 650; Prentice and Egan, *The Commerce Clause*, 70; Trickett, *The Original Pack-*

making of separate contracts may be the mere observance of a formality in the effort to destroy the federal jurisdiction over part of what would otherwise be interstate transportation throughout. And it is not clear that the federal jurisdiction may be destroyed in that manner. The rate which a shipper must pay for transportation does not depend simply upon agreement with the carrier: even a definite contract with the carrier will not enable him to secure interstate transportation at less than the published rate.⁶⁵ And if the making of a contract between the parties does not affect the power of the federal government over transportation which is substantially interstate, the manner in which the parties arrange for the transportation cannot be of overwhelming importance.

Undisclosed intentions.

19. But while the relation between the parties does not depend entirely upon contract, it does not follow that

age Ineptitude, 6 Col. L. Rev. 161; *Purity E. & T. Co. v. Lynch* (1912) 226 U. S. 192, 33 Sup. Ct. 44, 57 L. ed. 184; *Cook v. Marshall County* (1905) 196 U. S. 261, 25 Sup. Ct. 233, 49 L. ed. 471; *Austin v. Tennessee* (1900) 179 U. S. 343, 21 Sup. Ct. 132, 45 L. ed. 225.

⁶⁵ *Armour P. Co. v. United States* (1908) 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681; *Kansas C. S. Ry. Co. v. Albers Comn. Co.* (1912) 223 U. S. 573, 32 Sup. Ct. 316, 56 L. ed. 556; *Louisville & N. R. Co. v. Mottley* (1911) 219 U. S. 467, 31 Sup. Ct. 265, 55 L. ed. 297; *New Y. C. & H. R. R. Co. v. United States* (No. 2) (1909) 212 U. S. 500, 504, 29 Sup. Ct. 309, 311, 53 L. ed. 624; *Texas & P. Ry. Co. v. Mugg* (1906) 202 U. S. 242, 26 Sup. Ct. 628, 50 L. ed. 1011. See also *Chicago & A. R. Co. v. Kirby* (1912) 225 U. S. 155, 32 Sup. Ct. 648, 56 L. ed. 1033; *United States v. Miller* (1912) 223 U. S. 599, 32 Sup. Ct. 323, 56 L. ed. 568; *Philadelphia, B. & W. R. Co. v. Schubert* (1912) 224 U. S. 603, 32 Sup. Ct. 589, 56 L. ed. 911; *American S. R. Co. v. Delaware, L. & W. Ry. Co.* (1912) 200 Fed. 652; *Clegg v. St. Louis & S. F. R. Co.* (1913) 203 Fed. 971. There is, however, no reason to doubt that if in the *Armour* case the shipper had acted in time it might have secured an injunction restraining the railroad from establishing or from maintaining the higher rate, even though, so long as the higher rate remained in force, the shipper could not lawfully pay less than that rate.

duties may be imposed upon a railroad merely by the undisclosed intention of a shipper or consignee or may be imposed retroactively when those intentions are disclosed. On the contrary, it may well be the case that the rights and duties of the railroad for the first part of the total transportation may be definitely established when that part of the transportation takes place,⁶⁶ or even as far back as the time when the shipper makes the demand for that transportation,⁶⁷ and the rates for that part of the transportation may then be unalterable. Yet even though the relation between the parties with regard to what had already happened could not then be changed, there seems to be no reason why the federal government should not be able to reach out directly and punish a shipper or passenger for his conduct if he has made a break in interstate transportation simply in order to secure local rates for part of the distance. The Interstate Commerce Act expressly forbids the railroad companies to interrupt the through interstate transportation of freight for any such purpose.⁶⁸ It seems that to that extent at least that sec-

⁶⁶ See *Gulf, C. & S. F. Ry. Co. v. Texas* (1907) 204 U. S. 403, 413, 27 Sup. Ct. 360, 363, 51 L. ed. 540.

⁶⁷ See *In the Matter of Through Routes and Through Rates* (1907) 12 I. C. C. 163. Consider also *Drinker*, Interstate Commerce Act, sec. 237, and cases cited in latter part of note 34, *supra*.

⁶⁸ "It shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by any other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act." Act Feb. 4, 1887, c. 104, sec. 7, 24 U. S. Stats. at L. 379, 382, 1 Supp. to Rev. Stats. 529, 530, 3 Fed. Stats. An. 808, 832.

tion of the act is constitutional. And it seems that if there were a similar prohibition upon shippers and passengers that prohibition also would be constitutional.

Auxiliary services.

20. The Interstate Commerce Act empowers the commission to establish rates applicable to the receipt, delivery, elevation and transfer in transit of goods in the course of interstate railroad transportation, and the Supreme Court has enforced provisions of the act referring to elevation,⁶⁹ terminal and switching services.⁷⁰

Before the enactment of this provision the Supreme Court sustained a law which regulated the charges for transferring from a canal-boat to an ocean steamer grain which was apparently being carried from a place in another state to a foreign port.⁷¹ The court, however, gave

⁶⁹ *Union P. R. Co. v. Updike G. Co.* (1911) 222 U. S. 215, 32 Sup. Ct. 39, 56 L. ed. 171; *Interstate Com. Comn. v. Diffenbaugh* (1911) 222 U. S. 42, 32 Sup. Ct. 22, 56 L. ed. 83. See also *Elwood G. Co. v. St. Joseph & G. I. Ry. Co.* (1913) 202 Fed. 845.

⁷⁰ *United States v. Union S. Y. & T. Co.* (1912) 226 U. S. 286, 33 Sup. Ct. 83, 57 L. ed. 226. See also *Southern P. T. Co. v. Interstate Com. Comn.* (1911) 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310, which arose under the Interstate Commerce Act; *United States v. Terminal R. Assn. of St. Louis* (1912) 224 U. S. 383, 412, 32 Sup. Ct. 507, 516, 56 L. ed. 810, which arose under the Anti-Trust Act; and *St. Louis, S. F. & T. Ry. Co. v. Seale* (1913) 229 U. S. 156, 33 Sup. Ct. 651, 57 L. ed. 1129, which relates to the Employers' Liability Act.

⁷¹ *New York ex rel. Annan v. Walsh*, decided with *Budd v. New York* (1892) 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247. See also *People v. Budd* (1889) 117 N. Y. 1, 9, 22, 22 N. E. 670, 673, 678, 5 L. R. A. 559. Compare *State v. Omaha E. Co.* (1906) 75 Neb. 654, 110 N. W. 874. The court said, in deciding the *Annan* case with others, "So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the state of New York. It operates only within the limits of that state, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in *Munn v. Illinois*. It is of the same character with navigation laws in respect to navigation within the state, and laws regulating wharfage rates within the

only slight attention to the bearing of the commerce clause upon the subject.

The court has also sustained a state law which imposed a franchise tax upon a local cab service which connected

state, and other kindred laws:" 143 U. S. 545, 12 Sup. Ct. 476, 36 L. ed. 256. *Munn v. Illinois* (1876) 94 U. S. 113, 24 L. ed. 77, and *Brass v. North Dakota* (1894) 153 U. S. 391, 14 Sup. Ct. 857, 38 L. ed. 757, do not go so far as the *Annan* case, for they involve primarily storage charges. In *Munn v. Illinois* the court says (p. 135) that the warehouses "are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or cart by which, but for them, the grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction." The *Munn* case differs from the *Annan* case in that it does not appear that the main use of the *Munn* warehouse was the prompt transfer of grain from one carrier to another. Decisions sustaining navigation laws do not bear on the question directly. In the absence of congressional action a state may enact some regulations concerning the navigation of waters which are entirely within the state, but which form part of a continuous highway for interstate commerce: see cases at end of note 91, *infra*. And, Congress having passed no laws upon the subject, the court upholds state laws which authorize individuals and companies having control of wharves and improved waterways to collect charges named by the state from those who use such facilities, even though they are carrying goods to or from other states: *Ouachita P. Co. v. Aiken* (1887) 121 U. S. 444, 7 Sup. Ct. 907, 30 L. ed. 976; *Transportation Co. v. Parkersburg* (1883) 107 U. S. 691, 2 Sup. Ct. 733, 27 L. ed. 584; *Packet Co. v. Catlettsburg* (1882) 105 U. S. 559, 26 L. ed. 1169. See also *Weems S. Co. v. People's S. Co.* (1909) 214 U. S. 345, 29 Sup. Ct. 661, 53 L. ed. 1024; *Atlantic & P. T. Co. v. Philadelphia* (1903) 190 U. S. 160, 163, 23 Sup. Ct. 817, 818, 47 L. ed. 995; *Lindsay & Phelps Co. v. Mullen* (1900) 176 U. S. 126, 148, 154, 20 Sup. Ct. 325, 333, 335, 44 L. ed. 400; *Monongahela N. Co. v. United States* (1893) 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463. Compare *Harmon v. Chicago* (1893) 147 U. S. 396, 13 Sup. Ct. 306, 37 L. ed. 216. The statutes were contested by companies which used the improvements, not by those who controlled them. But see *Southern P. T. Co. v. Interstate Com. Comm.* (1911) 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310, cited in sec. 16, *supra*, and discussion in *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511.

with an interstate ferry and railroad service furnished by the same company but under separate contracts with its patrons, the court declaring that the transportation in the cabs was not part of interstate transportation.⁷²

But while in a case which arose under the Interstate Commerce Act there is a dictum by a circuit court of appeals that carting to and from stations is an independent business which is not usually carried on by the companies themselves nor usually within the scope of the act or the power of Congress,⁷³ yet in a case which subse-

⁷² *New York v. Knight* (1904) 192 U. S. 21, 24 Sup. Ct. 202, 48 L. ed. 325. With this case we must compare *Swift & Co. v. United States* (1905) 196 U. S. 375, 392, 401, 25 Sup. Ct. 276, 277, 281, 49 L. ed. 518, referred to in note 74, *infra*. In the *Knight* case the court said that the service was taxable because it was contracted for independently and was, therefore, merely preliminary to interstate transportation or subsequent thereto. On this point see secs. 16-18, *supra*. Extended reference was made to *Coe v. Errol*, considered in notes 51, 53, *supra*, and 73, *infra*. The case of *Detroit, G. H. & M. Ry. Co. v. Interstate Com. Comn.* (see note 73, *infra*) which was cited, would add more weight to the decision if the cab service had been rendered by another company than the one which operated the ferry and the railroad. See *People v. Knight* (1901) 67 N. Y. App. Div. 398, 73 N. Y. Supp. 790 (1902) 171 N. Y. 354, 64 N. E. 152, for opinions of the lower courts in the present case. And it may be interesting to compare the discussion in *The Robert W. Parsons* (1903) 191 U. S. 17, 32, 24 Sup. Ct. 8, 13, 48 L. ed. 17, on supplying grain for canal-boat horses with the remarks in this case on supplying grain for cab horses.—We must note that the decision in this case deals with taxation and not with rate regulation: see *Hanley v. Kansas C. S. Ry. Co.* (1903) 187 U. S. 617, 621, 23 Sup. Ct. 214, 215, 47 L. ed. 333; *Old D. S. Co. v. Virginia* (1905) 198 U. S. 299, 306, 25 Sup. Ct. 686, 688, 49 L. ed. 1059; compare *Covington & C. B. Co. v. Kentucky* (1894) 154 U. S. 204, 222, 14 Sup. Ct. 1087, 1094, 38 L. ed. 962; *Kidd v. Pearson* (1888) 128 U. S. 1, 26, 9 Sup. Ct. 6, 12, 32 L. ed. 346. And it deals with transportation by cabs and not by railroads. The cab service was unimportant and the court touched on that fact. It was somewhat different from the service of an intrastate railroad, which may carry for hundreds of miles. It seems that because of the size of rowboats courts of admiralty do not exercise jurisdiction over them: see *The Robert W. Parsons* (1903) 191 U. S. 17, 33, 24 Sup. Ct. 8, 13, 48 L. ed. 80; compare 191 U. S. 30, 24 Sup. Ct. 12, 48 L. ed. 78, 79.

⁷³ This was before the amendment of 1906. The court said that carting to and from stations "is a business done almost exclusively by outsiders

quently arose under the federal Anti-trust Act the Supreme Court decided that an agreement between interstate shippers which included the making of uniform charges for cartage for delivery of their goods to their customers was in that respect unlawful.⁷⁴

It seems that in all cases such as those which we have just considered, the charges for the transportation may

and rarely by the railroad companies, and being usually done wholly within the territorial limits of a state is not within the jurisdiction of Congress. . . . We have no doubt that whenever it does become an element of interstate commerce it is within the control of Congress and falls within the regulations of this act, but in determining how far its provisions apply to cartage we should carefully keep in mind the fact that it is a separate and independent business, not usually carried on by the railroad companies themselves nor usually within the scope of the act or the power of Congress:" *Detroit, G. H. & M. Ry. Co. v. Interstate Com. Comm.* (1896) 74 Fed. 803, 813. For final decision see *Interstate Com. Comm. v. Detroit, G. H. & M. Ry. Co.* (1897) 167 U. S. 633, 644, 646, 17 Sup. Ct. 986, 990, 42 L. ed. 310. See also *Hirsch v. New E. N. Co.* (1908) 129 N. Y. App. Div. 178, 113 N. Y. Supp. 395. And in *Coe v. Errol* (1886) 116 U. S. 517, 528, 6 Sup. Ct. 475, 479, 29 L. ed. 715, a case concerning state taxation of property, the court said that the interstate "movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state, its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing." On this case see also notes 51, 53, *supra*.

⁷⁴ *Swift & Co. v. United States* (1905) 196 U. S. 375, 392, 401, 25 Sup. Ct. 276, 277, 281, 49 L. ed. 518. The court said that cartage for which the packers made uniform charges was "not an independent matter, such as was dealt with in *New York ex rel. Pennsylvania R. Co. v. Knight* (1904) 192 U. S. 21, 24 Sup. Ct. 202, 48 L. ed. 325, (see note 72, *supra*) but a part of the contemplated transit—cartage for delivery of the goods."

well be regulated by the state in the absence of federal legislation which is inconsistent with such regulation. But it also seems clear that in so far as such services relate to interstate transportation the charges for them must be subject to the paramount control of Congress.⁷⁵

CHARTERS AND CONTRACTS.

Waiver of constitutional rights, expressly and by implication.

21. We have already noted that while the Constitution empowers Congress to regulate interstate rates⁷⁶ the states have power to regulate local rates.⁷⁷ The court has said that the states may regulate local rates even where the railroad was chartered by the federal government, at least until Congress directs otherwise.⁷⁸ And it is sub-

⁷⁵ On the question whether the mere empowering of the Interstate Commerce Commission to regulate switching services deprives the state courts of power to enforce the common law in the absence of action by the Commission, see *Missouri P. Ry. Co. v. Larabee F. M. Co.* (1909) 211 U. S. 612, 29 Sup. Ct. 214, 53 L. ed. 352; *Savage v. Jones* (1912) 225 U. S. 501, 32 Sup. Ct. 715, 56 L. ed. 1182; with which compare *Southern Ry. Co. v. Reid* (1912) 222 U. S. 424, 32 Sup. Ct. 140, 56 L. ed. 257; *Southern Ry. Co. v. Reid & Beam* (1912) 222 U. S. 444, 32 Sup. Ct. 145, 56 L. ed. 263; *Northern P. Ry. Co. v. Washington* (1912) 222 U. S. 370, 32 Sup. Ct. 160, 56 L. ed. 237; *McNeill v. Southern Ry. Co.* (1906) 202 U. S. 543, 26 Sup. Ct. 722, 50 L. ed. 1142.

⁷⁶ See sec. 6, *supra*.

⁷⁷ See notes 39, 40, *supra*.

⁷⁸ *Smyth v. Ames* (1898) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Reagan v. Mercantile T. Co.* (1894) 154 U. S. 413, 14 Sup. Ct. 1060, 38 L. ed. 1028. See also *St. Louis & S. F. Ry. Co. v. Stevenson* (1895) 156 U. S. 667, 15 Sup. Ct. 491, 39 L. ed. 574, (affirming (1891) 54 Ark. 116, 15 S. W. 22); *Thompson v. Kentucky* (1908) 209 U. S. 340, 28 Sup. Ct. 533, 52 L. ed. 822; *Allen v. Riley* (1906) 203 U. S. 347, 355, 27 Sup. Ct. 95, 98, 51 L. ed. 216; *South Carolina v. United States* (1905) 199 U. S. 437, 463, 26 Sup. Ct. 110, 117, 50 L. ed. 261, 4 A. & E. An. Cas. 737, 743, 744; *Murray v. Wilson D. Co.* (1909) 213 U. S. 151, 173, 29 Sup. Ct. 458, 465, 53 L. ed. 742; *Cooke, State and Federal Control of Corporations*, 23 Harv. L. Rev. 456. And a road is not exempt from state regulation be-

mitted that Congress cannot direct otherwise—that it cannot deprive the states of their power to regulate rates which are strictly local.⁷⁹

But, admitting that Congress has no law-making power over rates which are strictly local, may it regulate such rates by virtue of a contract with the railroad granting that power, if such regulations do not conflict with any state law? And might the states regulate interstate rates by virtue of contracts with the railroads if the regulations did not conflict with any federal regulations?

We are assuming, of course, the existence of clear contracts. It seems that a state does not by the mere chartering of a railroad obtain a right to regulate its interstate rates,⁸⁰ and, if so, Congress does not by the mere

cause it was granted land and a right of way by the federal government and, by virtue of acts of Congress, is a post and military route: *St. Louis & S. F. Ry. Co. v. Gill* (1891) 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452. On the other hand, in *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107, 31 Sup. Ct. 342, 55 L. ed. 389, a federal law which taxed state corporations was sustained.

⁷⁹ See notes 39, 40, *supra*. Upon what ground could railroads chartered by Congress claim exceptional treatment as to their local transportation? Has Congress any greater authority to empower its railroads to conduct intrastate transportation than one state has to empower its own railroads to carry persons or goods between points within another jurisdiction? Yet with discussion in this section and in *Cooke, The Source of Authority to Engage in Interstate Commerce*, 24 Harv. L. Rev. 635; *Cooke, State and Federal Control of Corporations*, 23 Harv. L. Rev. 456, and note *State Interference with Federal Governmental Agencies*, 10 Col. L. Rev. 458; compare *Fairleigh, Inquiry into Power of Congress to Regulate the Intrastate Business of Interstate Railroads*, 9 Col. L. Rev. 38; *Hudson, Federal Incorporation*, 26 Pol. Sci. Quar. 63.

⁸⁰ See *State v. Atchison, T. & S. F. Ry. Co.* (1903) 176 Mo. 687, 75 S. W. 776, 63 L. R. A. 761; *Louisville & N. R. Co. v. Railroad Comn.* (1884) 19 Fed. 679, 711; and also *Northern S. Co. v. United States* (1904) 193 U. S. 197, 345, 24 Sup. Ct. 436, 460, 48 L. ed. 679; *Interstate Com. Comn. v. Detroit, G. H. & M. Ry. Co.* (1897) 167 U. S. 633, 642, 17 Sup. Ct. 986, 989, 42 L. ed. 310; *Carroll v. Greenwich Ins. Co.* (1905) 199 U. S. 401, 409, 26 Sup. Ct. 66, 67, 50 L. ed. 246; *National C. J. O. U. A. M. v. State Council* (1906) 203 U. S. 151, 162, 27 Sup. Ct. 46, 48, 51 L. ed. 132; *Hous-*

act of chartering obtain control over the local rates of a company. But those statements may simply show what weight the court will give to the act of chartering. We are assuming the existence of clear contracts.

Express waiver of constitutional rights.

22. May, then, a railroad by contract empower Congress to regulate its local rates, if such regulations do not conflict with state regulations, and might a railroad by contract empower a state to regulate its interstate rates if such regulations did not conflict with federal law?

A circuit court of appeals, in an opinion which was prepared by Judge Taft and concurred in by Judges Lurton and Clark, has decided that a city may by contract bind a railroad to furnish interstate transportation to its citizens at rates which do not unjustly discriminate against them.⁸¹ The court distinguished between the power to limit rates by law and the power to limit them by contract.

There is also a number of other cases in the Supreme Court and in state and federal courts which assert that a

ton D. N. Co. v. Insurance Co. of N. A. (1895) 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713. *Contra* State v. Cincinnati, N. O. & T. P. Ry. Co. (1890) 47 Ohio St. 130, 23 N. E. 928, 7 L. R. A. 319; *dissenting* opinion in Wabash, St. L. & P. Ry. Co. v. Illinois (1886) 118 U. S. 557, 7 Sup. Ct. 4, 30 L. ed. 244. In the latter case the prevailing opinion does not discuss the question. In Covington & C. B. Co. v. Kentucky (1894) 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. ed. 962, where two states chartered an interstate bridge, the court merely decided that neither state alone may regulate the tolls. In St. Clair County v. Interstate S. & C. T. Co. (1904) 192 U. S. 454, 465, 24 Sup. Ct. 300, 303, 48 L. ed. 518, the decision in the bridge case is misstated. See also Cooke, The Source of Authority to Engage in Interstate Commerce, 24 Harv. L. Rev. 635, 640, 641; Cooke, State and Federal Control of Corporations, 23 Harv. L. Rev. 456.

⁸¹ Iron M. R. Co. v. City of Memphis (1899) 96 Fed. 113.

railroad cannot, while benefitting by a contract, deny the power of a city or state to make that contract.⁸²

Moreover, the United States Supreme Court refuses to review the correctness of decisions by state courts that

⁸² *Southern P. Co. v. Portland* (1913) 227 U. S. 559, 33 Sup. Ct. 308, 57 L. ed. 642; *Interstate C. S. Ry. Co. v. Commonwealth* (1907) 207 U. S. 79, 28 Sup. Ct. 26, 52 L. ed. 111; *Grand R. & I. Ry. Co. v. Osborn* (1904) 193 U. S. 17, 24 Sup. Ct. 310, 48 L. ed. 598; *Daniels v. Tearney* (1880) 102 U. S. 415, 26 L. ed. 187; *Chicago, R. I. & P. Ry. Co. v. Zernecke* (1902) 183 U. S. 582, 22 Sup. Ct. 229, 46 L. ed. 339; *Merchants' Nat. Bank v. Sexton* (1913) 228 U. S. 634, 33 Sup. Ct. 725, 57 L. ed. 998; cases cited in *Pullman Co. v. Kansas* (1910) 216 U. S. 56, 67, 30 Sup. Ct. 232, 236, 54 L. ed. 378; *National M.B. & L. Assn. v. Brahan* (1904) 193 U. S. 635, 24 Sup. Ct. 532, 48 L. ed. 823; *Cooley, Constitutional Limitations*, 7th ed., 250; *Emporia v. Emporia T. Co.* (1913) 88 Kan. 443, 129 Pac. 187; *Potter v. Calumet E. S. Ry. Co.* (1908) 168 Fed. 521; *Robinson v. Harmon* (1908) 157 Mich. 266, 272, 117 N. W. 661 (1909) 157 Mich. 276, 122 N. W. 106; *Simons' Sons Co. v. Maryland T. & T. Co.* (1904) 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727; *Vining v. Detroit, Y., A. A. & J. Ry.* (1903) 133 Mich. 539, 95 N. W. 542; *Muncie N. G. Co. v. Muncie* (1903) 160 Ind. 97, 66 N. E. 436, 60 L. R. A. 822; *Minor v. Erie R. Co.* (1902) 171 N. Y. 566, 64 N. E. 454; *Purdy v. Erie R. Co.* (1900) 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669; *People v. Suburban R. Co.* (1899) 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650; *San Diego L. & T. Co. v. National City* (1896) 74 Fed. 79, 81, affirmed on another ground (1899) 174 U. S. 739, 19 Sup. Ct. 804, 43 L. ed. 1154; *Westfield G. & M. Co. v. Mendenhall* (1895) 142 Ind. 538, 41 N. E. 1033; *Mayor v. Manhattan Ry. Co.* (1894) 143 N. Y. 1, 37 N. E. 494; *Allegheny v. Millville, E. & S. S. Ry. Co.* (1893) 159 Pa. 411, 416, 28 Atl. 202; *Louisville & N. R. Co. v. Railroad Comn.* (1884) 19 Fed. 679, 711; *Pacific R. Co. v. Leavenworth* (1871) 1 Dill. 393, Fed. Cas. No. 10649; *Ferguson v. Landram* (1868) 5 Bush (Ky.) 230; *St. Louis & M. R. Co. v. Kirkwood* (1900) 159 Mo. 239, 60 S. W. 110, 53 L. R. A. 300. And see *Gen. Dig., Const. L., sec. 41*; *Dec. Dig., Const. L., sec. 43*; 28 *Am. L. Rev.* 405. Compare *American S. & R. Co. v. Colorado* (1907) 204 U. S. 103, 27 Sup. Ct. 198, 51 L. ed. 393. *Contra* *State v. Omaha & C. B. Ry. & B. Co.* (1901) 113 Iowa, 30, 84 N. W. 983, 52 L. R. A. 315; and see *State v. Western & A. R. Co.* (1912) 138 Ga. 835, 843, 76 S. E. 577, 581; *Keefe v. Lexington & B. S. Ry. Co.* (1904) 185 Mass. 183, 70 N. E. 37; *Galveston & W. Ry. Co. v. Galveston* (1897) 90 Tex. 398, 91 Tex. 17, 39 S. W. 96, 920, 36 L. R. A. 33; *South Pasadena v. Los Angeles T. Ry. Co.* (1895) 109 Cal. 315, 41 Pac. 1093; *Appeal of City of Pittsburgh* (1886) 115 Pa. 4, 7 Atl. 778; dissenting opinion in *Wabash, St. L. & P. Ry. Co. v. Illinois* (1886) 118 U. S. 557, 588, 7 Sup. Ct. 4, 19, 30 L. ed. 244. In the Iowa case the ordinance was clearly void for another reason, but the remarks of the court on the commerce clause are decidedly unconvincing.

parties have waived the benefit of constitutional provisions or of federal statutes, taking the ground that such decisions do not involve federal questions.⁸³ These cases necessarily imply that at least some rights secured by federal law may be waived.

But there is another line of cases, distinguishable from those just mentioned though of questionable consistency with them, which holds void agreements by foreign corporations not to remove to federal courts any cases which may arise in the future.⁸⁴ It is, however, admitted that the right to remove a suit may be waived in each recurring case.⁸⁵

Now, it is obvious that a carrier cannot, in any way, exempt itself from the duty of complying with the requirements of a valid act of Congress,⁸⁶ and it is equally

⁸³ *Leonard v. Vicksburg, S. & P. R. Co.* (1905) 198 U. S. 416, 422, 25 Sup. Ct. 750, 753, 49 L. ed. 1108, and cases cited therein; and see *Mobile, J. & K. C. R. Co. v. Mississippi* (1908) 210 U. S. 187, 204, 28 Sup. Ct. 650, 656, 52 L. ed. 1016; *Marrow v. Brinkley* (1889) 129 U. S. 178, 9 Sup. Ct. 267, 32 L. ed. 954. With these cases compare *Grand R. & I. Ry. Co. v. Osborn* (1904) 193 U. S. 17, 24 Sup. Ct. 310, 48 L. ed. 598.

⁸⁴ See cases cited in *Cable v. United S. L. I. Co.* (1903) 191 U. S. 288, 306, 307, 24 Sup. Ct. 74, 77, 78, 48 L. ed. 188. But compare *Security M. L. Ins. Co. v. Prewitt* (1906) 202 U. S. 246, 26 Sup. Ct. 619, 50 L. ed. 1013.

⁸⁵ On the question of waiver of constitutional rights see also *Schick v. United States* (1904) 195 U. S. 65, 24 Sup. Ct. 826, 49 L. ed. 99, (followed in *Mullan v. United States* (1909) 212 U. S. 516, 29 Sup. Ct. 330, 53 L. ed. 632); *Cooley, Constitutional Limitations*, 7th ed., 250; *Cen. Dig., Const. L.*, sec. 41; *Dec. Dig., Const. L.*, sec. 43; *Foster v. Morse* (1882) 132 Mass. 354; *Conde v. Schenectady* (1900) 164 N. Y. 258, 263, 58 N. E. 130, 131; *Ferguson v. Landram* (1868) 5 Bush (Ky.) 230; *Hingham & Q. B. & T. Corp. v. County of Norfolk* (1863) 88 Mass. 353, 357. Compare *O'Brien v. Wheelock* (1902) 184 U. S. 450, 22 Sup. Ct. 354, 46 L. ed. 636.

⁸⁶ *United States Constitution*, Article VI, cl. 2; *Chicago, I. & L. Ry. Co. v. United States* (1911) 219 U. S. 486, 497, 31 Sup. Ct. 272, 275, 55 L. ed. 305; *Northern S. Co. v. United States* (1904) 193 U. S. 197, 333, 24 Sup. Ct. 436, 455, 48 L. ed. 679; *Gulf, C. & S. F. Ry. Co. v. Hefley* (1895) 158 U. S. 98, 15 Sup. Ct. 802, 39 L. ed. 910; *Fitzgerald v. Fitzgerald & Mallory C. Co.* (1894) 41 Neb. 374, 59 N. W. 538; and see *Chicago, B. &*

obvious that a state cannot by law deprive a carrier of any right secured to it by the Federal Constitution or by a valid federal law;⁸⁷ but it certainly does not follow from either of these truisms that that which is a right and not a duty may not be bargained away; and the court has not shown any sufficient reason for declaring that a right which may be bargained away for one specific occasion may not be bargained away for all occasions which may arise in the future.

There is also another line of cases which is somewhat similar to those which we have just discussed. In them the court has held that while a state may forbid a carrier to transact intrastate business within its borders without giving any reason for its prohibition, it cannot make its permission to transact such business depend upon a waiver by the carrier of its constitutional rights.⁸⁸ Dis-

Q. R. Co. v. Hall (1913) 229 U. S. 511, 33 Sup. Ct. 885, 57 L. ed. 1306; *St. Louis, I. M. & S. Ry. Co. v. Hesterly* (1913) 228 U. S. 702, 33 Sup. Ct. 703, 57 L. ed. 1031; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 25, 25 Sup. Ct. 358, 361, 49 L. ed. 643; *Missouri, K. & T. Ry. Co. v. Haber* (1898) 169 U. S. 613, 626, 18 Sup. Ct. 488, 493, 42 L. ed. 878; *National M. B. & L. Assn. v. Brahan* (1904) 193 U. S. 635, 647-651, 24 Sup. Ct. 532, 535-537, 48 L. ed. 823; notes 4, 24, *supra*. Compare *Dallemagne v. Moisan* (1905) 197 U. S. 169, 174, 25 Sup. Ct. 422, 424, 49 L. ed. 709.

⁸⁷ See, on the right to resort to federal courts, *Madisonville T. Co. v. St. Bernard M. Co.* (1905) 196 U. S. 239, 253, 25 Sup. Ct. 251, 257, 49 L. ed. 462; *Blake v. McClung* (1898) 172 U. S. 239, 255, 19 Sup. Ct. 165, 171, 43 L. ed. 432; *Barrow S. Co. v. Kane* (1898) 170 U. S. 100, 111, 18 Sup. Ct. 526, 530, 42 L. ed. 964; and cases there cited; *Chicago, R. I. & P. Ry. Co. v. Ludwig* (1907) 156 Fed. 152. Compare *Security M. L. Ins. Co. v. Prewitt* (1906) 202 U. S. 246, 26 Sup. Ct. 619, 50 L. ed. 1013; *Dillard, The Power of a State to Restrict the Right of a Foreign Corporation to Remove Cases to the United States Courts*, 40 *Chi. Leg. News*, 316, 323, 336.

⁸⁸ *Herndon v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 135, 158, 30 Sup. Ct. 633, 639, 54 L. ed. 970; *Southern Ry. Co. v. Greene* (1910) 216 U. S. 400, 30 Sup. Ct. 287, 54 L. ed. 536; *Western U. T. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355; *Pullman Co. v. Kansas* (1910) 216 U. S. 56, 30 Sup. Ct. 232, 54 L. ed. 378; *Ludwig v. Western U. T. Co.* (1910) 216 U. S. 146, 30 Sup. Ct. 280, 54 L. ed. 423. Compare citations in note 89, *infra*.

senting justices have declared that the court has never given any sufficient reason for its position,⁸⁹ and their statement seems to be correct; but the court has, nevertheless, taken that position in several cases. The decisions, however, do not directly overrule the cases in which the court has held that where there is an express contract a railroad cannot, while benefitting by the contract, deny the power of the city or the state to make that contract.

INTERSTATE AND INTRASTATE HIGHWAYS.

Decisions concerning navigation.

23. There remains for us to note simply those cases which have arisen under what may be termed the "inter-state highway" rule. The court in cases which arose a number of years ago decided that the federal government has power to regulate navigation entirely within one state upon waters which by themselves or by connection with other waters form a continuous highway for interstate or foreign commerce,⁹⁰ but that the states have ex-

⁸⁹ *Western U. T. Co. v. Kansas* (1910) 216 U. S. 1, 52, 30 Sup. Ct. 190, 208, 54 L. ed. 355; *Pullman Co. v. Kansas* (1910) 216 U. S. 56, 75, 77, 30 Sup. Ct. 232, 240, 241, 54 L. ed. 378. See also *Security M. L. Ins. Co. v. Prewitt* (1906) 202 U. S. 246, 26 Sup. Ct. 619, 50 L. ed. 1013; *Hammond P. Co. v. Arkansas* (1909) 212 U. S. 322, 29 Sup. Ct. 370, 53 L. ed. 530; Willoughby *On the Constitution*, pp. 150, 698; discussion in 23 *Harv. L. Rev.* 549-551; *Denver v. New Y. T. Co.* (1913) 229 U. S. 123, 141, 142, 33 Sup. Ct. 657, 666, 57 L. ed. 1101. Compare brief 216 U. S. at 16; 21 *Harv. L. Rev.* 215; Bowman, *The State's Power Over Foreign Corporations*, 9 *Mich. L. Rev.* 549.

⁹⁰ *The Montello* (1874) 20 Wall. 430, 22 L. ed. 391 (1870) 11 Wall. 411, 20 L. ed. 191. Federal license and machinery regulations were applied to a vessel which carried between two places in the same state upon a waterway which formed in connection with other waters a continuous highway to other states. To some extent the vessel carried goods coming from and goods destined to points outside the state, but this fact was apparently considered unimportant. See 11 Wall. 415, 20 L. ed. 192. In *The Oyster Police Steamers* (1887) 31 Fed. 763, penalties for noncompliance

clusive power to regulate navigation upon intrastate waters which do not form part of such continuous highway, although goods carried upon them are destined to other states.⁹¹ And this distinction the court based upon the commerce clause, although it might with far more

with a federal inspection law were imposed upon police boats which were used entirely within the state; and in the *United States v. Beacham* (1886) 29 Fed. 284, a federal law concerning the equipment of boats was applied in the case of an excursion steamer plying between two points in the same state. See also *The Daniel Ball* (1870) 10 Wall. 557, 19 L. ed. 999; *Lord v. Steamship Co.* (1880) 102 U. S. 541, 26 L. ed. 224 (which was explained in *Lehigh V. R. Co. v. Pennsylvania* (1892) 145 U. S. 192, 203, 12 Sup. Ct. 806, 808, 809, 36 L. ed. 672; *The Robert W. Parsons* (1903) 191 U. S. 17, 35, 24 Sup. Ct. 8, 14, 48 L. ed 17); *United States v. Burlington & H. C. F. Co.* (1884) 21 Fed. 331; *The City of Salem* (1889) 38 Fed. 762, 4 L. R. A. 125, 37 Fed. 846, 2 L. R. A. 380; *United States v. The Frank Sylvia* (1888) 37 Fed. 155; *The Hazel Kirke* (1885) 25 Fed. 601; *Harmon v. Chicago* (1893) 147 U. S. 396, 13 Sup. Ct. 306, 37 L. ed. 216; *Cooke, The Commerce Clause*, pp. 91-93; *United States v. Chandler-Dunbar W. P. Co.* (1913) 229 U. S. 53, 33 Sup. Ct. 667, 57 L. ed. 1063. Compare *The Gretna Green* (1883) 20 Fed. 901; *Passenger Cases* (1849) 7 How. 283, 400, 12 L. ed. 702; *Montgomery v. Portland* (1903) 190 U. S. 89, 105, 23 Sup. Ct. 735, 737, 47 L. ed. 965; *United States v. Bellingham B. B. Co.* (1900) 176 U. S. 211, 215, 20 Sup. Ct. 343, 344, 44 L. ed. 437; *Sands v. Manistee R. I. Co.* (1887) 123 U. S. 288, 295, 8 Sup. Ct. 113, 116, 31 L. ed. 149; *Gibbons v. Ogden* (1824) 9 Wheat. 1, 194, 195, 3 L. ed. 23.

⁹¹ *Veazie v. Moor* (1852) 14 How. 568, 14 L. ed. 545. The court decided that a federal coasting license did not grant to the holder the right to use an improved waterway which was entirely within a state and which had no navigable connection with places outside the state, although a railroad connected a point on that waterway with the ocean, and it asserted that Congress could not grant him such power. The commerce while "availing itself of those facilities was unquestionably internal, although intermediately or ultimately it might become foreign." The case is cited in *Covington & C. B. Co. v. Kentucky* (1894) 154 U. S. 204, 210, 14 Sup. Ct. 1087, 1089, 38 L. ed. 962, as authority for the proposition that the states have exclusive power to regulate the navigation of such waters "notwithstanding the fact that the goods or passengers carried or travelling over such highway between points in the same state may ultimately be destined for other states, and, to a slight extent, the state regulations may be said to interfere with interstate commerce." See also *Commonwealth v. King* (1889) 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536; *The Rockaway* (1907) 166 Fed. 692, 694.

propriety have based it upon the grant of admiralty powers.⁹²

Discussion.

24. It is improbable, however, that the distinction would be applied in determining the validity of state or federal regulations of charges for transportation by water;⁹³ and it seems clear that authority over railroad charges does not depend upon whether or not the railroad is part of a "continuous highway"—that even though a railroad itself extends into several states its charges for transportation which is strictly local are within the control of the states and are not within the control of Congress,⁹⁴ and that a railroad which carries under a through bill of lading goods destined to another state would not be subject to the exclusive power of the state while carrying within its borders if at the boundary of the state the cars were transferred to floats or the goods were placed upon boats for carriage to their destination.⁹⁵

⁹² See *Lehigh V. R. Co. v. Pennsylvania* (1892) 145 U. S. 192, 203, 12 Sup. Ct. 806, 808, 809, 36 L. ed. 672; *The Lottawanna* (1874) 21 Wall. 558, 577, 22 L. ed. 654; *Cooke, The Commerce Clause*, pp. 91-93; *Waite, Admiralty Jurisdiction and State Waters*, 11 Mich. L. Rev. 580.

⁹³ And does the grant of admiralty and maritime jurisdiction to the federal government (U. S. Constitution, Art. III, sec. 2) enable Congress to limit the charges for carrying between two points within a state by means of a waterway which connects with the ocean but which is entirely within the state? See *In re Garnett* (1891) 141 U. S. 1, 12, 11 Sup. Ct. 840, 842, 35 L. ed. 631; *The Robert W. Parsons* (1903) 191 U. S. 17, 24 Sup. Ct. 18, 48 L. ed. 17; note 18 C. C. A. 349; *United States v. Burlington & H. C. F. Co.* (1884) 21 Fed. 331.

⁹⁴ See notes 39, 40, *supra*.

⁹⁵ The Interstate Commerce Act extends to interstate transportation which is partly by railroad and partly by water, and the act does not in terms require that either the railroad or the waterway be part of a "continuous highway." See also *New York v. Knight* (1904) 192 U. S. 21, 26, 24 Sup. Ct. 202, 203, 48 L. ed. 325; *New Y. C. & H. R. R. Co. v. Board of Chosen Freeholders* (1913) 227 U. S. 248, 33 Sup. Ct. 269, 57 L. ed. 499.

Safety appliance cases.

25. In addition to the continuous highway cases which we have just noted, there is also a recent case⁹⁶ in which the court, without referring to those cases, has decided that Congress may constitutionally require the equipment with safety appliances of all locomotives, cars and other similar vehicles which are used on any railroad which is a highway of interstate commerce, even though some of the vehicles may be used solely in local transportation. The court, however, gave no attention whatever to the question whether such interstate highway were a continuous interstate highway. And the opinion does not indicate any desire upon the part of the court to overrule the many earlier cases in which it has delimited the respective powers of Congress and of the states over interstate rates and over local rates.

⁹⁶ *Southern Ry. Co. v. United States* (1911) 222 U. S. 20, 32 Sup. Ct. 2, 56 L. ed. 72. See also *Pedersen v. Delaware, L. & W. R. Co.* (1913) 229 U. S. 146, 33 Sup. Ct. 648, 57 L. ed. 1125; *Second Employers' Liability Cases—Mondou v. New Y., N. H. & H. R. Co.* (1912) 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327; *Chicago J. Ry. Co. v. King* (1911) 222 U. S. 222, 32 Sup. Ct. 79, 56 L. ed. 173; *Interstate Com. Comm. v. Goodrich T. Co.* (1912) 224 U. S. 194, 32 Sup. Ct. 436, 56 L. ed. 729. Compare *Brinkmeier v. Missouri P. Ry. Co.* (1912) 224 U. S. 268, 32 Sup. Ct. 412, 56 L. ed. 758; *Baltimore & O. R. Co. v. Interstate Com. Comm.* (1911) 221 U. S. 612, 31 Sup. Ct. 621, 55 L. ed. 878; cases in note 40, *supra*; article on *Power of Congress to Require Cars Moving Intrastate Freight on a Railroad Engaged in Interstate Traffic to be Equipped with Safety Appliances*, 71 Cent. L. J. 423.

CHAPTER II.

THE DISTRIBUTION OF GOVERNMENTAL POWERS.

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INTRODUCTORY.

Distribution among three departments of government.

26. The United States and the several states have by their respective constitutions made partial ¹ distributions of the powers of those governments among three departments of government. In so doing they have by implication, and at times by express words, declared that an organ possessing the characteristics of one department shall not exercise powers which have been entrusted only to another department.² It is this restraint which we shall consider in the present chapter.

Federal and state problems distinct but similar.

27. Obviously, the distributive clauses of the Federal Constitution relate only to the federal government,³ and

¹ See page 49, *infra*.

² Cooley, *Constitutional Limitations*, 7th ed. 126; Cooley, *Constitutional Law*, 3d ed., 46; Black, *Constitutional Law*, 3d ed., p. 82; Bondy, *The Separation of Governmental Powers* (Columbia University Studies) 19-22; 6 A. & E. Enc. of L., 2d ed., 1006, 1009; 8 Cyc. 807, 828, 844, 858; *State v. Johnson* (1900) 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; *Western U. T. Co. v. Myatt* (1899) 98 Fed. 335; *Shepard v. City of Wheeling* (1887) 30 W. Va. 479, 4 S. E. 635. Compare 6 A. & E. Enc. of L., 2d ed., 1007; *State v. Bates* (1905) 96 Minn. 110, 116, 104 N. W. 709, 712; *Sawyer v. Dooley* (1893) 21 Nev. 390, 32 Pac. 437; and authorities cited in note 6 *infra*; and see *Atlantic E. Co. v. Wilmington & W. R. Co.* (1892) 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393. Professor Dunning, in 19 Pol. Sci. Quar. 487, claims that Aristotle did not express the views concerning the distribution of governmental powers which later writers have attributed to him.—The statement in the text is obviously true as to those constitutions which contain express declarations to that effect. As to those which do not contain such declarations, it is clear that one department cannot exercise power which has been entrusted only to another department without the consent of the latter. And the question whether even the consent of the latter can validate the exercise of a power otherwise than as provided in the constitution must be answered by a consideration of the purpose of those who adopted the constitutions when they decided to grant different governmental powers to different organs of government.

³ The United States Supreme Court said in *Satterlee v. Matthewson*

the distributive clauses of the state constitutions relate only to the governments of the respective states. Yet whether we consider the power of an organ of the federal government or the power of an organ of a state government the problems involved will be the same, for there is a general uniformity among the constitutions, although, of course, there are also variations among the constitutions which may prevent uniform answers to those problems, and even under similar provisions different conclusions may be reached by the authorities of different jurisdictions.⁴

Exceptions to broad general rules.

28. It is true that the actual distribution of powers is not strictly logical; that, for instance, the president or governor exercises power which is legislative in its char-

(1829) 2 Pet. 380, 413, 7 L. ed. 458, "There is nothing in the Constitution of the United States which forbids the legislature of a state to exercise judicial functions." See also *Calder v. Bull* (1798) 3 Dall. 386, 1 L. ed. 648; *Randall v. Kreiger* (1874) 23 Wall. 137, 147, 23 L. ed. 124; *Prentiss v. Atlantic C. L. Co.* (1908) 211 U. S. 210, 225, 29 Sup. Ct. 67, 69, 53 L. ed. 150; *Consolidated R. Co. v. Vermont* (1908) 207 U. S. 541, 552, 28 Sup. Ct. 178, 181, 52 L. ed. 327; *Michigan C. R. Co. v. Powers* (1906) 201 U. S. 245, 294, 26 Sup. Ct. 459, 462, 463, 50 L. ed. 744; *Carfer v. Caldwell* (1906) 200 U. S. 293, 297, 26 Sup. Ct. 264, 265, 50 L. ed. 488; *League v. Texas* (1902) 184 U. S. 156, 161, 22 Sup. Ct. 475, 477, 46 L. ed. 478; *Winchester & S. R. Co. v. Commonwealth*, (1906) 106 Va. 264, 267, 269, 55 S. E. 692, 693, 694, 13 Va. L. Reg. 418; Bondy, *The Separation of Governmental Powers* (Columbia University Studies) 21; *Mobile, J. & K. C. R. Co. v. Mississippi* (1908) 210 U. S. 187, 202, 28 Sup. Ct. 650, 655, 52 L. ed. 1016; *Claiborne Co. v. Brooks* (1884) 111 U. S. 400, 410, 4 Sup. Ct. 489, 494, 28 L. ed. 470; *Welch v. Swasey* (1909) 214 U. S. 91, 104, 29 Sup. Ct. 567, 570, 53 L. ed. 923.

⁴ *Prentiss v. Atlantic C. L. Co.* (1908) 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150; *Trustees v. Saratoga G., E. L. & P. Co.* (1908) 191 N. Y. 123, 135, 136, 83 N. E. 693, 696, 18 L. R. A. N. S. 713, 720; *People v. Cook* (1907) 147 Mich. 127, 131, 132, 110 N. W. 514, 516; *State v. Kline* (1907) 50 Ore. 426, 430, 431, 93 Pac. 237, 239; *Winchester & S. R. Co. v. Commonwealth* (1906) 106 Va. 264, 55 S. E. 692; *Wheeler's Appeal* (1877)

acter when he vetoes legislation, and legislative bodies exercise power of a judicial nature when they try cases of impeachment and power of an administrative nature when they consider appointments to office.⁵ But such constitutional exceptions, and even exceptions, which appear in some constitutions, which directly affect rate regulation, do not lessen the positiveness of the rule in unexcepted cases.

Distribution of powers not complete.

29. It is, however, important that we notice that the distribution of powers is not complete, so that while some powers may be exercised only by the legislature, others only by an administrative organ, and still others only by the courts, there are also powers which are not definitely assigned by the constitutions and which may, therefore,

45 Conn. 306; *Martin v. Oregon R. & N. Co.* (1910) 58 Ore. 198, 113 Pac. 16; *McGehee*, *Due Process of Law*, 71; *Goodnow*, *The Principles of the Administrative Law of the United States*, 33, 95; and see remarks of *Christiancy, J.*, in *People v. Hurlburt* (1874) 24 Mich. 44, 63.

⁵ On the power of a legislature to appoint its own subordinate officers and to conduct investigations—which are not acts of a legislative nature, and on the power of a court to appoint its own subordinate officers and to exercise analogous powers—which are not acts of a judicial nature, see discussion in *Board of Comrs. v. Gwin* (1894) 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402; *Board of Comrs. v. Stout* (1893) 136 Ind. 53, 35 N. E. 683, 22 L. R. A. 398; *Goodnow*, *The Principles of the Administrative Law of the United States*, 37, 41, 446-448; *Bondy*, *The Separation of Governmental Powers* (Columbia University Studies) 34, 70, 76, 84, 114, 116, 122, 138; *Black*, *Constitutional Law*, 3d ed., p. 85 et seq.; *In re Janitor of Supreme Court* (1874) 35 Wis. 410; *In re Chapman* (1897) 166 U. S. 661, 17 Sup. Ct. 677, 41 L. ed. 1154; *State v. Pierre* (1908) 121 La. 465, 46 So. 574. And see 6 A. & E. Enc. of L., 2d ed., 1007; 21 Harv. L. Rev. 161; *Board of Comrs. v. McGregor* (1909) 171 Ind. 634, 87 N. E. 1. Compare the authorities cited in note 25, *infra*. The actual decision in *Kilbourn v. Thompson* (1880) 103 U. S. 168, 26 L. ed. 377, was simply that the federal House of Representatives did not have authority to make the particular investigation there considered.

be exercised by the legislature itself or be assigned by it to one of the other departments.⁶

Local self-government.

30. Moreover, the legislature may grant some self-government to the localities.⁷ In so doing it is not reassign-

⁶ See Cooley, *Constitutional Law*, 3d ed., 45, 46; Bondy, *The Separation of Governmental Powers* (Columbia University Studies) 79, 80; Stevens, *Sources of the Constitution of the United States*, 49; *Sabre v. Rutland R. Co.* (1913) Vt., 85 Atl. 693; *Oregon R. & N. Co. v. Campbell* (1909) 173 Fed. 958; *Toncray v. Budge* (1908) 14 Idaho, 621, 95 Pac. 26; *Incorporated Village of Fairview v. Giffey* (1905) 73 Ohio St. 183, 76 N. E. 865; *State v. Struble* (1905) 19 S. D. 646, 104 N. W. 465; *State v. Bates* (1905) 96 Minn. 110, 104 N. W. 709; *Paul v. Gloucester County* (1888) 50 N. J. L. 585, 611, 15 Atl. 272, 284, 1 L. R. A. 86; *Brown v. Turner* (1874) 70 N. C. 93, 102; 6 A. & E. Enc. of L., 2d ed., 1007; *Ross v. Whitman* (1856) 6 Cal. 361; *Opinion of the Justices* (1885) 138 Mass. 601; sec. 30, *infra*; note 79, *infra*; and also *Carroll v. Wright* (1908) 131 Ga. 728, 740, 63 S. E. 260, 265; 21 Harv. L. Rev. 139. And there are powers which other organs may exercise until forbidden by the legislature: see, e. g., 8 A. & E. Enc. of L., 2d ed., 29, 30; compare note 25, *infra*.

⁷ Cooley, *Constitutional Limitations*, 7th ed., 165, 172, 263, 264; 8 Cyc. 837; Dec. Dig., Const. L., sec. 63; 6 A. & E. Enc. of L., 2d ed., 1027, 1024; 28 *id.*, 160; Dillon, *Municipal Corporations*, 5th ed., sec. 573; Goodnow, *The Principles of the Administrative Law of the United States*, 37; and see Oberholtzer, *The Referendum in America*, 324, 332, 334; Sutherland, *Statutory Construction*, 2d ed., p. 170; *State v. Donovan* (1913) Wash., 130 Pac. 356; *Lee Wilson & Co. v. W. R. Crompton B. & M. Co.* (1912) 102 Ark., 146 S. W. 110; *State v. Sanders* (1912) 130 La. 272, 57 So. 924; *State ex rel. Hunt v. Tausick* (1911) 64 Wash. 69, 116 Pac. 651, 35 L. R. A. N. S. 802; *Plinkiewisch v. Portland Ry., L. & P. Co.* (1911) 58 Ore. 499, 115 Pac. 151; *In re Pfahler* (1906) 150 Cal. 71, 88 Pac. 270, 11 L. R. A. N. S. 1092. Compare *Ex parte Farnsworth* (1911) 61 Tex. Cr. 342, 135 S. W. 535; *Elliott v. City of Detroit* (1899) 121 Mich. 611, 84 N. W. 820; *Bradshaw v. Lankford* (1891) 73 Md. 428, 21 Atl. 66, 11 L. R. A. 582; *Slinger v. Henneman* (1875) 38 Wis. 504; *Fournier v. Commissioners of Aroostook County* (1912) 109 Me. 48, 82 Atl. 545; *Cotteral v. Barker* (1912) 34 Okla. 533, 126 Pac. 211; *Burton v. Dupree* (1898) 19 Tex. Civ. App. 275, 46 S. W. 272; *In re Municipal Suffrage to Women* (1894) 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113; but with the cases last cited see *Commonwealth v. Kingsbury* (1908) 199 Mass. 542, 85 N. E. 848; *Graham v. Roberts* (1908) 200 Mass. 152, 85 N. E. 1009. Congress may grant local, but only local, powers to the territories: see Stouten-

ing power which has been entrusted exclusively to itself, for such limited power has been constantly granted to local authorities from time immemorial, and the general language of the constitutions is interpreted in accordance with this custom, since contemporary history does not furnish any reason for thinking that those who adopted the constitutions intended to abolish the custom. And, of course, the fact that a constitution assigns a given power to one organ of the central government does not of itself oblige the legislature when it bestows a similar power over strictly local matters upon an organ of local government to bestow it upon a similar organ.⁸

burgh v. Hennick (1889) 129 U. S. 141, 9 Sup. Ct. 256, 32 L. ed. 637; and also McCornick v. Western U. T. Co. (1897) 79 Fed. 449, 451, 38 L. R. A. 684; Ansley v. Ainsworth (1902) 4 Ind. Ter. 308, 69 S. W. 884. It seems that there would be less "refinement of reasoning" (see *In re Rahrer* (1891) 140 U. S. 545, 562, 11 Sup. Ct. 865, 869, 35 L. ed. 572) in sustaining local option and similar laws upon the ground given in the text than in sustaining them upon the ground which is usually given: *Paul v. Gloucester County* (1888) 50 N. J. L. 585, 594, 600, 603, 604, 15 Atl. 272, 276, 279, 280, 1 L. R. A. 86; and see *Oberholtzer, The Referendum in America*, 208-217, 324; *Cooley, Constitutional Limitations*, 7th ed., 168, 169. Compare *Field v. Clark* (1892) 143 U. S. 649, 694, 12 Sup. Ct. 495, 505, 36 L. ed. 294; *Sutherland, Statutory Construction*, 2d ed., p. 173; *Oberholtzer, op. cit.*, 324, 328; *Bryan v. Voss* (1911) 143 Ky. 422, 136 S. W. 884; *United States v. Richards* (1910) 35 D. C. App. 540; *McDonald v. Denton* (1910) Tex. Civ. App., 132 S. W. 823; *Evers v. Hudson* (1907) 36 Mont. 135, 148, 92 Pac. 462, 466, 467; *Fouts v. Hood River* (1905) 46 Ore. 492, 81 Pac. 370, 1 L. R. A. N. S. 483; *McGonnell's License* (1904) 209 Pa. 327, 58 Atl. 615; *Locke's Appeal* (1873) 72 Pa. St. 491, 508; cases in note 95, *infra*. On the other hand, it is submitted that delegations of power to state boards cannot properly be based upon this exception to the general rule, however defensible they may sometimes be upon another ground. Consider *Brodline v. Revere* (1903) 182 Mass. 598, 66 N. E. 607; *People v. Harper* (1878) 91 Ill. 357, 370; *Pierce v. Doolittle* (1906) 130 Iowa, 333, 336, 106 N. W. 751, 752, 6 L. R. A. N. S. 143, 145; *Tilley v. Savannah, F. & W. R. Co.* (1881) 5 Fed. 641, 657; *United States v. Grimaud* (1911) 220 U. S. 506, 516, 31 Sup. Ct. 480, 482, 483, 55 L. ed. 563; 19 Harv. L. Rev. 203; 20 Harv. L. Rev. 147.—On the rule as to local self-government see also discussion in section 44, *infra*.

⁸ *People v. Provines* (1868) 34 Cal. 520, 532; *State v. City of Mankato*

EXTENT OF POWER OF LEGISLATURE.

General extent of power.

31. At the time of the American Revolution the British Parliament had absolute power over the persons and political institutions under British control, subject only to a veto-power.⁹ By the Revolution the state legislatures¹⁰

(1912) 117 Minn. 458, 136 N. W. 264, 41 L. R. A. N. S. 111; *State v. Ure* (1912) 91 Neb. 31, 135 N. W. 224; *Eckerson v. City of Des Moines* (1908) 137 Iowa, 462, 465, 115 N. W. 177, 182; *Staudt v. Board of Election Comrs.* (1882) 61 Cal. 313, 322. See also *State ex rel. Wilkinson v. Lane* (1913) Ala., 62 So. 31; *Commonwealth v. Collier* (1905) 213 Pa. 138, 62 Atl. 567; *Muhlenberg County v. Morehead* (1898) 20 Ky. L. Rep. 376, 46 S. W. 484; *Pennington v. Woolfolk* (1880) 79 Ky. 13; *State v. Keener* (1908) 78 Kan. 649, 97 Pac. 860, 19 L. R. A. N. S. 615; *Terre Haute v. Evansville & T. H. R. Co.* (1897) 149 Ind. 174, 46 N. E. 77, 37 L. R. A. 189; *Fox v. McDonald* (1893) 101 Ala. 51, 69, 13 So. 416, 419, 21 L. R. A. 529; *Bondy, The Separation of Governmental Powers* (Columbia University Studies) 179, 183; *Goodnow, The Principles of the Administrative Law of the United States*, 35-37; and cases there cited. Compare *State v. Armstrong* (1907) 91 Miss. 613, 44 So. 809; *Mayor v. Dechert* (1870) 32 Md. 369; and also *Trustees v. Saratoga G., E. L. & P. Co.* (1908) 191 N. Y. 123, 134, 135, 83 N. E. 693, 696, 18 L. R. A. N. S. 713, 719.

⁹ See *Blackstone, Commentaries*, I, *91, *160-*162; *The Case of Captain Streater* (1653) 5 How. State Trials, 365, 386, 387; *Lee v. Bude & T. J. Ry. Co.* (1871) L. R. 6 C. P. 576, 582; *Courtney, The Working Constitution of the United Kingdom*, 4; *Dicey, The Law of the Constitution*, 7th ed., 58 et seq.; *Lowell, The Government of England*, I, 9; *Hurtado v. California* (1884) 110 U. S. 516, 531, 4 Sup. Ct. 111, 292, 119, 28 L. ed. 232; *Slaughter House Cases* (1872) 16 Wall. 36, 65, 21 L. ed. 394. That veto-power has not been exercised since 1707: *Anson, The Law and Custom of the Constitution*, 3d ed., I, 301.

¹⁰ "The governments of the states possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions:" *Munn v. Illinois* (1876) 94 U. S. 113, 124, 24 L. ed. 77. "The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed:" *McPherson v. Blacker* (1892) 146 U. S. 1, 25, 13 Sup. Ct. 3, 7, 36 L. ed. 869. "In a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves

acquired similar power over the persons and political institutions of their states, subject to gubernatorial veto, although constitutions soon limited their powers and placed some powers in the hands of other governmental organs beyond the reach of legislative exercise or control. And while Congress can deal only with subject-

by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. The power of the people of the states to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said:" *Twining v. New Jersey* (1908) 211 U. S. 78, 106, 29 Sup. Ct. 14, 22, 53 L. ed. 97. See also *Coffey v. County of Harlan* (1907) 204 U. S. 659, 662, 27 Sup. Ct. 305, 306, 51 L. ed. 666; *Dorman v. State* (1859) 34 Ala. 216, 232-234; *Thorpe v. Rutland & B. R. Co.* (1854) 27 Vt. 140; *Redell v. Moores* (1901) 63 Neb. 219, 230, 231, 88 N. W. 243, 247, 55 L. R. A. 740, 744, 745; *Sutherland, Statutory Construction*, 2d ed., sec. 81; *Patterson, The United States and the States Under the Constitution*, 2d ed., p. 2; *Cooley, Constitutional Limitations*, 7th ed., 128, 233, 236, 241; 6 A. & E. Enc. of L., 2d ed., 934; 8 Cyc. 775; *Black, Constitutional Law*, 2d ed., pp. 63, 64, 3d ed., p. 72; *Sedgwick, Construction of Statutory and Constitutional Law*, 2d ed., 154; note 126 in Chap. 4, *infra*; *Goodnow, The Principles of the Administrative Law of the United States*, 40; 7 Harv. L. Rev. 422; 32 Am. L. Reg. N. S. 1093, 1097; 21 Harv. L. Rev. 383; 12 Harv. L. Rev. 469; 9 Mich. L. Rev. 108; *Wulf v. Kansas City* (1908) 77 Kan. 358, 361, 367, 94 Pac. 207, 208, 210; *State v. Missouri P. Ry. Co.* (1907) 76 Kan. 467, 489, 92 Pac. 606, 613; *Ratcliff v. Wichita U. S. Co.* (1906) 74 Kan. 1, 16, 86 Pac. 150, 155, 6 L. R. A. N. S. 834; *State v. Fountain* (1906) 6 Pennewill (Del.) 520, 528, 69 Atl. 926, 930; *Harder's F. S. & V. Co. v. Chicago* (1908) 235 Ill. 58, 68, 85 N. E. 245, 247; dissenting opinion in *Abbott v. Beddingfield* (1899) 125 N. C. 256, 268, 272, 34 S. E. 412, 415, 416; *Century Digest, Const. Law*, II, B, Grant or limitation of power; *Dec. Digest, Const. Law*, secs. 25, 26, 50; *House v. Mayes* (1911) 219 U. S. 270, 282, 31 Sup. Ct. 234, 236, 55 L. ed. 213; *Halter v. Nebraska* (1907) 205 U. S. 34, 40, 27 Sup. Ct. 419, 421, 51 L. ed. 696; *Northwestern N. L. I. Co. v. Riggs* (1906) 203 U. S. 243, 253, 27 Sup. Ct. 126, 128, 51 L. ed. 168. On the effect of a grant of power to legislate see notes 12, 13, *infra*. With the authorities in this note compare *State v. Moores* (1898) 55 Neb. 480, 490, 76 N. W. 175, 177, 41 L. R. A. 624, 627, and authorities there cited (which case was overruled in *Redell v. Moores*, *supra*); 32 Am. L. Reg. N. S. 3, 784, 971, 1064; 13 Harv. L. Rev. 441; *Report of Pennsylvania Bar Assn.*, VI, 251; and the absolutely indefensible position taken in *Freund, Police Power*, pp. 132, 133.—The subject which we are considering is discussed more fully in sections 92-104, *infra*.

matters entrusted to it,¹¹ except in regard to the territories,¹² as to such subject-matters its general power is the same as that of state legislatures over subject-matters not removed from their control,¹³ though it also is under express restrictions and some governmental powers have

¹¹ *Hodges v. United States* (1906) 203 U. S. 1, 16, 27 Sup. Ct. 6, 8, 51 L. ed. 65; *United States v. Harris* (1883) 106 U. S. 629, 635, 1 Sup. Ct. 601, 606, 27 L. ed. 290; *Kansas v. Colorado* (1907) 206 U. S. 46, 81, 87, 88, 89, 92, 27 Sup. Ct. 655, 661, 663, 664, 665, 51 L. ed. 950; *Keller v. United States* (1909) 213 U. S. 138, 29 Sup. Ct. 470, 53 L. ed. 737. See also *House v. Mayes* (1911) 219 U. S. 270, 281, 31 Sup. Ct. 234, 236, 55 L. ed. 213; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 22, 25 Sup. Ct. 358, 359, 49 L. ed. 643. Compare *The Lottawanna* (1874) 21 Wall. 558, 576, 577, 22 L. ed. 654, concerning a power which seems to have been granted simply by implication.

¹² *El Paso & N. E. R. Co. v. Gutierrez* (1909) 215 U. S. 87, 30 Sup. Ct. 21, 54 L. ed. 106; *National Bank v. County of Yankton* (1879) 101 U. S. 129, 25 L. ed. 1046; *Utter v. Franklin* (1899) 172 U. S. 416, 423, 19 Sup. Ct. 183, 186, 43 L. ed. 498; *Mormon Church v. United States* (1890) 136 U. S. 1, 42, 43, 10 Sup. Ct. 792, 802, 803, 34 L. ed. 478. See also *Oklahoma v. Atchison, T. & S. F. Ry. Co.* (1911) 220 U. S. 277, 285, 31 Sup. Ct. 434, 435, 55 L. ed. 465; *De Lima v. Bidwell* (1901) 182 U. S. 1, 196, 21 Sup. Ct. 743, 753, 45 L. ed. 1041; *Shively v. Bowlby* (1894) 152 U. S. 1, 48, 14 Sup. Ct. 548, 566, 38 L. ed. 331; *Patterson, The United States and the States Under the Constitution*, 2d ed., pp. 8, 9.

¹³ *United States v. Chandler-Dunbar W. P. Co.* (1913) 229 U. S. 53, 62, 33 Sup. Ct. 667, 671, 672, 57 L. ed. 1063; *Lewis B. P. O. C. Co. v. Briggs* (1913) 229 U. S. 82, 89, 33 Sup. Ct. 679, 681, 57 L. ed. 1083; *McDermott v. Wisconsin* (1913) 228 U. S. 115, 128, 33 Sup. Ct. 431, 433, 57 L. ed. 754; *Hoke v. United States* (1913) 227 U. S. 308, 323, 33 Sup. Ct. 281, 284, 57 L. ed. 523; *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107, 153, 154, 31 Sup. Ct. 342, 350, 55 L. ed. 389; *Louisville & N. R. Co. v. Mottley* (1911) 219 U. S. 467, 480, 31 Sup. Ct. 265, 269, 55 L. ed. 297; *Atlantic C. L. R. Co. v. Riverside Mills* (1911) 219 U. S. 186, 202, 31 Sup. Ct. 164, 169, 55 L. ed. 167; *Burton v. United States* (1906) 202 U. S. 344, 366, 367, 26 Sup. Ct. 688, 693, 50 L. ed. 1057; *Lottery Case—Champion v. Ames* (1903) 188 U. S. 321, 353, 23 Sup. Ct. 321, 325, 47 L. ed. 492; *Chinese Exclusion Case* (1889) 130 U. S. 581, 603, 604, 9 Sup. Ct. 623, 629, 32 L. ed. 1068; *Juilliard v. Greenman* (1884) 110 U. S. 421, 447-450, 4 Sup. Ct. 122, 129-131, 28 L. ed. 204; *Gibbons v. Ogden* (1824) 9 Wheat. 1, 196, 197, 6 L. ed. 23; *Patterson, The United States and the States Under the Constitution*, 2d ed., p. 17; *McMurtrie, Observations on Mr. George Bancroft's Plea for the Constitution*, 24, 25.

been placed beyond its exercise or control. In other words, the state legislatures, over subject-matters not withdrawn from their control, and Congress, over subject-matters entrusted to it, have all governmental powers not entrusted by the constitutions to other organs of government and not withdrawn from the control of those legislative bodies by other provisions of the constitutions.

Power to establish rates.

32. It is, therefore, clear that legislative bodies may determine the principles upon which railroad charges shall be based and may themselves ordain specific schedules of rates for future transportation, unless those powers, or either of them, have been entrusted exclusively to another organ of government by the constitutional provisions which assign judicial powers to the courts or by those which assign administrative powers to administrative organs, or unless the legislatures are restrained by other constitutional provisions which we need not here consider.

The question whether a legislature in making enactments of the character referred to would entrench upon the power of an administrative organ has apparently never arisen, and it is doubtful whether such a contention will ever be made. We must, however, consider the question whether legislative enactments of that character would entrench upon the power of the courts.

It is true that, in the absence of statute, the courts may, in cases properly before them, determine the amount which a common carrier may charge for services rendered by it.¹⁴ But there is a clear distinction between applying

¹⁴ *Stern v. Metropolitan T. & T. Co.* (1897) 46 N. Y. Supp. 110, 19 N. Y. App. Div. 316; *Cook & Wheeler v. Chicago, R. I. & P. Ry. Co.* (1890)

an existing rule of law (in that case the common law) and adopting a new and possibly different rule of law for relations which may exist in the future.¹⁵ The legislature, in regulating rates, is not deciding what the rights of parties are at the time the schedule is enacted. It is not interpreting the common law. It is adopting for the future a rule which supersedes that law.

Power to change common law.

33. And certainly the legislature may change the common law.¹⁶ The only legal restrictions upon legislative

81 Iowa, 551, 46 N. W. 1080, 9 L. R. A. 764; *Menacho v. Ward* (1886) 27 Fed. 529. See also *Salt R. V. C. Co. v. Nelssen* (1906) 10 Ariz. 9, 85 Pac. 117, 12 L. R. A. N. S. 711. Even without such decisions, it would seem to follow from the fact that a common carrier cannot refuse to carry: *Jackson v. Rogers* (1883) 2 Show. 327, that it cannot escape this duty by charging whatever it pleases. See also *Allnutt v. Inglis* (1810) 12 East, 527. In *Abilene C. O. Co. v. Texas & P. Ry. Co.* (1905) 38 Tex. Civ. App. 366, 85 S. W. 1052, the common law rule was applied to interstate shipments, but the decision was reversed, *Texas & P. Ry. Co. v. Abilene C. O. Co.* (1907) 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553, on the ground that the interstate commerce act had altered the method of securing relief from excessive charges.

¹⁵ See note 19, *infra*.

¹⁶ See *Munn v. Illinois* (1876) 94 U. S. 113, 134, 24 L. ed. 77; *Texas & P. Ry. Co. v. Abilene C. O. Co.* (1907) 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553; *St. Louis, I. M. & S. Ry. Co. v. Taylor* (1906) 210 U. S. 281, 294, 295, 28 Sup. Ct. 616, 621, 52 L. ed. 1080; *Wilmington S. M. Co. v. Fulton* (1907) 205 U. S. 60, 74, 27 Sup. Ct. 412, 417, 51 L. ed. 708; *West v. Louisiana* (1904) 194 U. S. 258, 262, 24 Sup. Ct. 650, 652, 48 L. ed. 965; *Barrett v. Indiana* (1913) 229 U. S. 26, 30, 33 Sup. Ct. 692, 693, 57 L. ed. 1050; *Second Employers' Liability Cases—Mondou v. New Y., N. H. & H. R. Co.* (1912) 223 U. S. 1, 50, 32 Sup. Ct. 169, 175, 56 L. ed. 327; *Atlantic C. L. R. Co. v. Riverside Mills* (1911) 219 U. S. 186, 31 Sup. Ct. 164, 55 L. ed. 167; *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 113, 31 Sup. Ct. 186, 188, 55 L. ed. 112; *Western U. T. Co. v. Commercial M. Co.* (1910) 218 U. S. 406, 417, 31 Sup. Ct. 59, 62, 54 L. ed. 1088; *Grenada L. Co. v. Mississippi* (1910) 217 U. S. 433, 441, 30 Sup. Ct. 535, 539, 54 L. ed. 826; *Slaughter House Cases* (1872) 16 Wall. 36, 65, 66, 21 L. ed. 394 (which fully answers dissenting opinion in that case); *Dilworth v. Schuylkill I. L. Co.* (1908) 219 Pa. 527, 530, 69 Atl. 47, 48; *Ivy v. Western U.*

action are those imposed by the constitutions. If a principle of the common law has been inserted in the constitutions it is binding upon the legislatures not as a principle of the common law but as a provision of the constitutions. And the fact that courts enforce compliance

T. Co. (1908) 165 Fed. 371, 376; *Sutherland v. Governor* (1874) 29 Mich. 320, 325, 326; Blackstone, Commentaries, I, *89; 6 A. & E. Enc. of L., 2d ed., 1034, 1035; notes 9 and 10, *supra*; and also Pound, Common Law and Legislation, 21 Harv. L. Rev. 383; *The Lottawanna* (1874) 21 Wall. 558, 577. Compare note 165 in Chapter 4, *infra*, and the unsound position taken in Pope, Municipal Contracts and Rate Regulation, 16 Harv. L. Rev. 1, 20, 21; Fenwick, Charter Contracts and the Regulation of Rates, 9 Mich. L. Rev. 225, 227. In *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 397, 14 Sup. Ct. 1047, 1054, 38 L. ed. 1014, the court, after saying correctly, "It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function," goes on to say, "Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limits of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates." This reference to the common law as furnishing a ground for judicial inquiry into the propriety of rates named by a governmental authority is clearly inappropriate. The reason given for the decision in *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970, is likewise unsound. And the same comment may be made on statements in *Ex parte Young* (1908) 209 U. S. 123, 147, 148, 166, 28 Sup. Ct. 441, 448, 449, 456, 52 L. ed. 714, 13 L. R. A. N. S. 932, 942, 950; *Missouri P. Ry. Co. v. Tucker* (1913) 230 U. S. 340, 33 Sup. Ct. 961, 57 L. ed. 1507. As showing the unsoundness of these reasons see Noyes, American Railroad Rates, 212, note, 250; Smalley, Railroad Rate Control (Publications of the American Economic Assn.) 48, 49, 50, 25; *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 375, 72 N. W. 713, 716; *San Diego L. & T. Co. v. National City* (1899) 174 U. S. 739, 754, 19 Sup. Ct. 804, 810, 43 L. ed. 1154; *Texas & P. Ry. Co. v. Abilene C. O. Co.* (1907) 204 U. S. 426, 26 Sup. Ct. 351, 51 L. ed. 553; Thompson, Private Corporations, 1st ed., p. 4231, note; authorities cited in notes 17, 18, 19, *infra*; secs. 49, 50, 51, *infra*; note 165 in Chapter 4, *infra*. Compare Pope, Municipal Contracts and Rate Regulation, 16 Harv. L. Rev. 1, 20, 21; Fenwick, Charter Contracts and the Regulation of Rates, 9 Mich. L. Rev. 225, 227.

with some constitutional provisions certainly does not show that rate regulation is judicial in its nature.¹⁷

Position of court on rate-making.

34. Indeed, the court itself has said expressly that "the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."¹⁸ "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end.

¹⁷ The court of last resort said in *Monongahela N. Co. v. United States* (1893) 148 U. S. 312, 327, 13 Sup. Ct. 622, 626, 37 L. ed. 463, that the amount of compensation to which the owner of property taken by the federal government is entitled is, in view of the just compensation provision of the Fifth Amendment, strictly a judicial question. It is submitted that this statement is incorrect (see *Bauman v. Ross* (1897) 167 U. S. 548, 593, 17 Sup. Ct. 966, 983, 42 L. ed. 270, and cases there cited, which are in direct opposition to the statement of the court in the *Monongahela N. Co.* case) and that in any event the statement is inapplicable to rate regulation. Conceding that if the owner be not given what the court considers just compensation the court may declare the taking unconstitutional, it certainly does not follow that the court may fix the amount of compensation in the first instance or may apply any but constitutional tests to the amount fixed. Indeed, the court also said in the same opinion that the decision of Congress is not conclusive, although without recognizing that this position is far different from the one already referred to. And even if the court had actually decided the case in accordance with its extremest language, we should still have many earlier and later declarations by the same court that the prescribing of future rates is a legislative or administrative act. See, e. g., *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 173, 20 Sup. Ct. 336, 338, 44 L. ed. 417, and notes 18, 19, 47, 61 and 62, *infra*.

¹⁸ *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 8, 29 Sup. Ct. 148, 150, 53 L. ed. 371.

Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind.”¹⁹

Power to enact detailed regulations.

35. Moreover, it must be noted that the constitutional provisions now under consideration do not oblige the legislature to state merely general principles and leave to the courts the statement of the application of those principles to particular circumstances which may exist thereafter. The legislature may do so, unquestionably, but it is not obliged to do so. The power of legislative bodies to enact detailed legislation, unless expressly forbidden by other provisions of the constitutions, is too well recog-

¹⁹ *Prentiss v. Atlantic C. L. Co.* (1908) 211 U. S. 210, 226, 29 Sup. Ct. 67, 69, 53 L. ed. 150. See also *Ross v. Oregon* (1913) 227 U. S. 150, 163, 33 Sup. Ct. 220, 223, 57 L. ed. 458; *Interstate Com. Comm. v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 88, 110, 30 Sup. Ct. 651, 659, 54 L. ed. 946; *Home Tel. Co. v. Los Angeles* (1908) 211 U. S. 265, 271, 278, 29 Sup. Ct. 50, 51, 54, 53 L. ed. 176; *Honolulu R. T. & L. Co. v. Hawaii* (1908) 211 U. S. 282, 29 Sup. Ct. 55, 53 L. ed. 186; *San Diego L. & T. Co. v. Jasper* (1903) 189 U. S. 439, 440, 23 Sup. Ct. 571, 47 L. ed. 892; *McChord v. Louisville & N. R. Co.* (1902) 183 U. S. 483, 495, 22 Sup. Ct. 165, 169, 46 L. ed. 289; *Interstate Com. Comm. v. Alabama M. Ry. Co.* (1897) 168 U. S. 144, 162, 18 Sup. Ct. 45, 47, 42 L. ed. 414; *Interstate Com. Comm. v. Cincinnati, N. O. & T. P. Ry. Co.* (1897) 167 U. S. 479, 499, 500, 501, 505, 506, 511, 17 Sup. Ct. 896, 900, 901, 902, 903, 905, 42 L. ed. 243; authorities at end of note 16, *supra*; notes 62, 63, *infra*; secs. 51, 60, *infra*; *State v. Johnson* (1900) 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; *Western U. T. Co. v. Myatt* (1899) 98 Fed. 335; *Gulf C. Co. v. Harris, Cortner & Co.* (1908) 158 Ala. 343, 48 So. 477, 24 L. R. A. N. S. 399; *Shephard v. City of Wheeling* (1887) 30 W. Va. 479, 4 S. E. 635. Cases sustaining legislative regulation are cited in *Atlantic C. L. R. Co. v. North Carolina Corp. Comm.* (1907) 206 U. S. 1, 19, 27 Sup. Ct. 585, 591, 51 L. ed. 933. Compare *People ex rel. Central P., N. & E. R. Co. v. Willcox* (1909) 194 N. Y. 383, 87 N. E. 517.

nized to be open to dispute.²⁰ If the legislature does not attempt to determine whether the conduct of individuals complies with regulations which it has laid down, it does not infringe upon any power which is bestowed exclusively upon the courts by the constitutional provisions which grant to them judicial power.

Some powers may be entrusted by legislature to other departments.

36. In addition to the regulative power which may be exercised only by the legislature²¹ (except in so far as that body authorizes local self-government)²² the legislature possesses powers which other organs of government may exercise but may not exercise exclusively: thus there are many administrative regulations which it may enact itself or the making of which it may entrust to administrative organs,²³ and it may, within limits which we need not here consider, make regulations concerning the internal organization and methods of operation of both adminis-

²⁰ *Central L. Co. v. South Dakota* (1912) 226 U. S. 157, 160, 33 Sup. Ct. 66, 67, 57 L. ed. 164; *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107, 158, 173, 31 Sup. Ct. 342, 352, 358, 55 L. ed. 389; *United States v. Delaware & H. Co.* (1909) 213 U. S. 366, 417, 29 Sup. Ct. 527, 539, 53 L. ed. 836; *Magoun v. Illinois T. & S. Bank* (1898) 170 U. S. 283, 294, 18 Sup. Ct. 594, 599, 42 L. ed. 1037; *Maynard v. Hill* (1888) 125 U. S. 190, 8 Sup. Ct. 723, 31 L. ed. 654; *Watkins v. Lessee of Holman* (1842) 16 Pet. 25, 10 L. ed. 873; *Lessee of Livingston v. Moore* (1833) 7 Pet. 469, 8 L. ed. 751; Black, *Constitutional Law*, 3d ed., p. 369; Goodnow, *The Principles of the Administrative Law of the United States*, 28, 40, 331, 332; *State v. Wolf* (1907) 145 N. C. 440, 59 S. E. 40; *Wheeler's Appeal* (1877) 45 Conn. 306, 319; *Southern I. Ry. Co. v. Railroad Comm.* (1909) 172 Ind. 113, 127, 87 N. E. 966, 971.

²¹ See note 29, *infra*.

²² See note 7, *supra*.

²³ See note 6, *supra*, and the discussion of delegation of power, *infra*.

trative²⁴ and judicial²⁵ organs, or it may entrust that power to the organs concerned.²⁶

²⁴ See Goodnow, *The Principles of the Administrative Law of the United States*, 123, 125.

²⁵ Brown on Jurisdiction, sec. 14; Wigmore on Evidence, secs. 7, 1353, 1354; Bondy, *The Separation of Governmental Powers* (Columbia University Studies) 31, 100; *In re Saddler* (1913) Okla., 130 Pac. 906; *Cary v. Mine & S. S. Co.* (1912) 53 Colo. 556, 129 Pac. 230; *Banks v. State* (1905) 124 Ga. 15, 52 S. E. 74, 2 L. R. A. N. S. 1007; *State v. Barrett* (1905) 138 N. C. 630, 50 S. E. 506, 1 L. R. A. N. S. 626; *In the Matter of the Estate of Stilwell* (1893) 139 N. Y. 337, 34 N. E. 777; *Whiting v. Townsend* (1881) 57 Cal. 515; *Cooper's Case* (1860) 22 N. Y. 67, 90; note 5, *supra*. See also *Hoopes v. Bradshaw* (1911) 231 Pa. 485, 80 Atl. 1098; *State v. Potello* (1911) 40 Utah, 119 Pac. 1023; *State v. Converse* (1911) 40 Utah, 119 Pac. 1030; *Mobile, J. & K. C. R. Co. v. Turnipseed* (1910) 219 U. S. 35, 43, 31 Sup. Ct. 136, 138, 55 L. ed. 78; *Bailey v. State* (1909) 161 Ala. 75, 48 So. 498; *Board of Comrs. v. McGregor* (1909) 171 Ind. 634, 87 N. E. 1; *State v. Pierre* (1908) 121 La. 465, 46 So. 574; *Lew v. Bray* (1908) 81 Conn. 213, 70 Atl. 628; *Sprintz v. Saxton* (1908) 125 N. Y. App. Div. 908, 110 N. Y. Supp. 585; *Memphis St. Ry. Co. v. Byrne* (1907) 119 Tenn. 278, 320, 321, 104 S. W. 460, 470; *People v. Hayne* (1890) 83 Cal. 111, 23 Pac. 1, 7 L. R. A. 348; *Brady v. Carteret R. Co.* (1907) 70 N. J. E. 748, 67 Atl. 606, 8 L. R. A. N. S. 866. Compare *In re Day* (1899) 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519; *Herndon v. Imperial F. I. Co.* (1892) 111 N. C. 384, 16 S. E. 465, 18 L. R. A. 547; *State v. Noble* (1889) 118 Ind. 350, 21 N. E. 244, 4 L. R. A. 101; *Houston v. Williams* (1859) 13 Cal. 24; *Calvert v. Carstarphen* (1903) 133 N. C. 25, 45 S. E. 353; *Ex parte Griffiths* (1889) 118 Ind. 83, 20 N. E. 513, 3 L. R. A. 398; Bondy, *op. cit.*, 168; and also *In re Janitor of Supreme Court* (1874) 35 Wis. 410.

²⁶ *Wayman v. Southard* (1825) 10 Wheat. 1, 42, 43, 46, 6 L. ed. 253; *Bank of the U. S. v. Halstead* (1825) 10 Wheat. 51, 61, 6 L. ed. 264; *Hudson v. Parker* (1895) 156 U. S. 277, 15 Sup. Ct. 450, 39 L. ed. 424; *Cooke v. Avery* (1893) 147 U. S. 375, 13 Sup. Ct. 340, 37 L. ed. 209; *Morton v. Pusey* (1908) 237 Ill. 26, 86 N. E. 601; *People v. Ahearn* (1908) 193 N. Y. 441, 86 N. E. 474; *Smith v. State Board of Medical Examiners* (1908) 140 Iowa, 66, 69, 72, 73, 117 N. W. 1116, 1117, 1118; *Stevens v. Truman* (1899) 127 Cal. 155, 59 Pac. 397; *White v. Toledo, St. L. & K. C. R. Co.* (1897) 79 Fed. 133; *Winston v. Stone* (1897) 102 Ky. 423, 43 S. W. 397; *State v. Adams Ex. Co.* (1896) 66 Minn. 271, 68 N. W. 1085, 38 L. R. A. 225; *Anderson v. Levely* (1882) 58 Md. 192; *Thompson v. Floyd* (1855) 2 Jones' L. (N. C.) 313. See also *State v. Struble* (1905) 19 S. D. 646, 104 N. W. 465; *Atlantic E. Co. v. Wilmington & W. R. Co.* (1892) 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393; *Hildreth v. Crawford* (1884) 65 Iowa, 339, 343; *Coleman v. Newby* (1871) 7 Kan. 82; 8 Cyc. 835; note 6, *supra*.

LIMITED POWER OF ADMINISTRATIVE ORGANS.

37. Administrative organs possess only the powers which have been entrusted to them by a constitution or by legislation.²⁷ Passing over clear grants of power by the constitutions with the remark that they may confer upon organs which are granted administrative power more than merely administrative power, and that in such cases decisions concerning merely administrative bodies may be inapplicable to such organs, and, conversely, decisions concerning them may be inapplicable to merely administrative organs, we shall inquire simply what portion of the power which may be exercised by the legislature may be granted by the legislature to administrative bodies without infringing the distribution of powers which is usually made by the constitutions.

DELEGATION OF POWER BY LEGISLATURE.**General principles.**

38. The courts have frequently determined that, except with reference to local affairs,²⁸ a legislature may not

²⁷ See *Interstate Com. Comn. v. Cincinnati, N. O. & T. P. Ry. Co.* (1897) 167 U. S. 479, 17 Sup. Ct. 896, 42 L. ed. 243; *Interstate Com. Comn. v. Alabama M. Ry. Co.* (1897) 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; *United States v. George* (1913) 228 U. S. 14, 22, 33 Sup. Ct. 412, 415, 57 L. ed. 712; *Southern P. Co. v. Interstate Com. Comn.* (1911) 219 U. S. 433, 444, 31 Sup. Ct. 288, 291, 55 L. ed. 283; *Siler v. Louisville & N. R. Co.* (1909) 213 U. S. 175, 29 Sup. Ct. 451, 53 L. ed. 753; *State ex rel. Ellis v. Atlantic C. L. R. Co.* (1906) 51 Fla. 578, 40 So. 875; *Board of R. Comrs. v. Oregon Ry. & Nav. Co.* (1888) 17 Ore. 65, 19 Pac. 702, 2 L. R. A. 195; *United States v. Eaton* (1892) 144 U. S. 677, 12 Sup. Ct. 764, 36 L. ed. 591; *Morrill v. Jones* (1883) 106 U. S. 466, 1 Sup. Ct. 423, 27 L. ed. 267; 23 A. & E. Enc. of L., 2d ed., 653; Goodnow, *The Principles of the Administrative Law of the United States*, 46, 47, 95; *People v. Healy* (1907) 231 Ill. 629, 83 N. E. 453; *Cumberland T. & T. Co. v. Memphis* (1912) 200 Fed. 657.

²⁸ On the power of the legislature to allow localities to govern themselves in some respects, see note 7, *supra*. That administrative and judi-

delegate its power of deciding questions of public policy,²⁹ and under this rule the provision of an act by which

cial organs may be allowed to make regulations concerning their own internal organization and methods of operation (see note 7, *supra*) hardly seems to be an exception to the general rule.

²⁹ In the following cases among others it has been actually decided that power which is strictly legislative may not be delegated and there are dicta to that effect in many other cases: *Central of Ga. Ry. Co. v. Railroad Comn.* (1908) 161 Fed. 925, 985 (where the statute dealt with rate-making by commission); *State v. Great N. Ry. Co.* (1907) 100 Minn. 445, 111 N. W. 289, 10 L. R. A. N. S. 250; *Brenke v. Borough of Belle Plaine* (1908) 105 Minn. 84, 117 N. W. 157; *Vallelly v. Board of Park Comrs.* (1907) 16 N. D. 25, 111 N. W. 615, 15 L. R. A. N. S. 61; *United States v. Matthews* (1906) 146 Fed. 306; *People v. Board of Election Comrs.* (1906) 221 Ill. 9, 77 N. E. 321; *Rose v. State* (1906) Ala., 40 So. 951; *Fite v. State* (1905) 114 Tenn. 646, 88 S. W. 941, 1 L. R. A. N. S. 520; *State v. Budge* (1905) 14 N. D. 532, 105 N. W. 724; *King v. Concordia F. I. Co.* (1905) 140 Mich. 258, 103 N. W. 616; *Phoenix I. Co. v. Perkins* (1905) 19 S. D. 59, 101 N. W. 1110; *State v. Rogers* (1905) 71 Ohio St. 203, 73 N. E. 461; *Mitchell v. State* (1902) 134 Ala. 392, 32 So. 687; *Gilhooly v. City of Elizabeth* (1901) 66 N. J. L. 484, 49 Atl. 1106; *Noel v. People* (1900) 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287; *Johnston C. Assn. v. Parker* (1899) 45 N. Y. App. Div. 55, 60 N. Y. Supp. 1015; *Inhabitants of Township of Bernards v. Allen* (1898) 61 N. J. L. 228, 39 Atl. 716; *In re Incorporation of North Milwaukee* (1896) 93 Wis. 616, 67 N. W. 1033, 33 L. R. A. 645; *Dowling v. Lancashire I. Co.* (1896) 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; *Hovey v. Commissioners of Wyandotte Co.* (1896) 56 Kan. 577, 44 Pac. 17; *Anderson v. Manchester F. A. Co.* (1895) 59 Minn. 182, 191, 63 N. W. 241, 28 L. R. A. 609, 610; *O'Neil v. American F. I. Co.* (1895) 166 Pa. 72, 30 Atl. 943, 26 L. R. A. 715; *State v. Gaster* (1893) 45 La. An. 636, 12 So. 739; *Board of Harbor Comrs. v. Excelsior R. Co.* (1891) 88 Cal. 491, 26 Pac. 375; *King v. Tennessee* (1889) 87 Tenn. 304, 10 S. W. 509, 3 L. R. A. 210; *Ex parte Cox* (1883) 63 Cal. 21; *Pilkey v. Gleason* (1856) 1 Iowa, 522; *Barto v. Himrod* (1853) 8 N. Y. 483; *State v. Field* (1853) 17 Mo. 529. See also *St. Louis M. B. T. Ry. Co. v. United States* (1911) 188 Fed. 191; *Village of Little Chute v. Van Camp* (1908) 136 Wis. 526, 117 N. W. 1012; *Commonwealth v. Addams* (1894) 95 Ky. 588, 26 S. W. 581; *State v. Gaunt* (1885) 13 Ore. 115, 9 Pac. 55; *Kehler & Bro. v. Jack M. Co.* (1876) 55 Ga. 639; and end of note 2, *supra*. But, of course, the fact that Locke (*On Civil Government*, sec. 142) declared broadly that a legislature may not transfer the power of making laws, while it may cast some light upon the intentions of those who long afterwards adopted the American constitutions, does not except for that purpose have any value whatever. Concerning Locke's book see also Stephen, *Horae Sabbaticae*, II, 155, 156.

a state legislature sought to empower a railroad commission to regulate rates has been declared unconstitutional.³⁰ In this chapter the validity of the rule will be assumed.³¹

³⁰ *Central of Ga. Ry. Co. v. Railroad Comn. of Alabama* (1908) 161 Fed. 925, 985. The provision was that "in all cases where any classification of railroads or of any articles of freight or any maximum rates or charges for the transportation of passengers or freight over any railroad in this state, have been, or may hereafter be prescribed by statute, or any prevailing rates or charges for such transportation have been, or may hereafter be, by statute made the maximum rates or charges, the Railroad Commission of Alabama shall have the power and is hereby authorized to change such classifications and such rates or charges, or any of them, from time to time as conditions may, in its judgment render expedient or proper so to do, whether the effect of such changes be to increase or reduce any of the rates or charges, and to establish and order to be put in force in lieu thereof any new classification or rate or charge which it may deem reasonable and proper; and the classifications, rates or charges so established by it shall be the lawful classifications, rates or charges until further changed by said Railroad Commission."

³¹ The rule can be based only upon the purpose of those who, in adopting the constitutions, distributed governmental powers. This purpose the courts have usually sought by reading the distributive clauses not in the light of political theories predominant when the constitutions were adopted but in the light of the common law principle that an agent may not delegate his powers, although the state legislatures, and apparently Congress, resemble Parliament more closely than they resemble mere agents. And, since the legislature may delegate some of its powers: see notes 6, 26, *supra*, and 33, 65, 82, *et seq.*, *infra*, the common law does not furnish a complete interpretation of the provisions.—The men who adopted the various constitutions were influenced by a theory which was based upon an appreciative generalization of governmental conditions which, as some of those who adopted the constitutions realized, did not fully accord with that generalization; and in many of the constitutions it is not clear how closely those who adopted them intended that theory to be followed in interpreting general provisions. See *The Federalist*, No. 47, *et seq.*; Stevens, *Sources of the Constitution of the United States*, 41, 42, 47, 48, 49, 57, 154, 155, 177. With the exception of *Marr v. Enloe* (1830) 1 Yerg. (Tenn.) 452, where that was one of the grounds of the decision, there seems to have been no case before 1847 in which legislation was actually declared unconstitutional upon the ground that legislative power was delegated. And since then the courts as a general rule certainly have not followed any theory consistently and intelligently. To an amazing extent the decisions are either based upon fictions or based upon cases which do not apply or the opin-

On the other hand, although rate regulation may involve questions of public policy,³² there are decisions that at least some specific rates named by commission are valid.³³

ions do not notice distinctions which are admitted by all who consider such distinctions. In spite of frequent declarations by the courts that legislative power may not be delegated, such opinions and decisions cast some doubt upon the propriety of their ever declaring legislation unconstitutional upon the ground that a constitution impliedly forbids a delegation of legislative power: see 21 Harv. L. Rev. 206; Thayer, *Life of Marshall*, chap. 5. Yet if it is clear that the legislature may not delegate a power which another organ attempts to exercise, the courts have a stronger reason for declaring that exercise unconstitutional than they ordinarily have for declaring the action of another department of government invalid, for the right of the courts to decide whether legislation has been passed by the body prescribed by the constitution is clearer than their right to decide whether legislation passed in the proper manner is constitutional: see language of Gibson, J., dissenting, in *Eakin v. Raub* (1825) 12 S. & R. (Pa.) 330, 349, 354.—The court said in *Chicago & N. W. Ry. Co. v. Dey* (1888) 35 Fed. 866, 874, 1 L. R. A. 744, 750, "After all, the question is one more of form than of substance. The vital question with both shipper and carrier is that the rates shall be just and reasonable, and not by what body they shall be put in force." To just as great an extent the question whether the President may order the punishment of a counterfeiter without trial is one "more of form than of substance." And so is the question whether in a common law suit in a federal court where the value in controversy exceeds twenty dollars the defendant may be denied a trial by jury. But the men who adopted some of our constitutions, at least, considered the forms of government important: see note 12 in Chapter 4, *infra*.

³² See secs. 47, 48, *infra*.

³³ *State ex rel. Webster v. Superior Court* (1912) 67 Wash. 37, 120 Pac. 861; *Louisville & N. R. Co. v. Interstate Com. Comn.* (1910) 184 Fed. 118; *State v. Chicago, M. & St. P. Ry. Co.* (1888) 38 Minn. 281, 37 N. W. 782; *Georgia R. & B. Co. v. Smith* (1883) 70 Ga. 694; *Tilley v. Savannah, F. & W. R. Co.* (1881) 5 Fed. 641; *McWhorter v. Pensacola & A. R. Co.* (1888) 24 Fla. 417, 5 So. 129, 2 L. R. A. 504; *Storrs v. Pensacola & A. R. Co.* (1892) 29 Fla. 617, 11 So. 226; and see *Chicago, I. & L. Ry. Co. v. Railroad Comn.* (1911) 175 Ind. 630, 644, 645, 95 N. E. 364, 369; *Trustees v. Saratoga G., E. L. & P. Co.* (1908) 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. N. S. 713; *Stone v. Yazoo & M. V. R. Co.* (1885) 62 Miss. 607, 645, 21 A. & E. R. Cas. 17; *People v. Harper* (1878) 91 Ill. 357; *Southern Ry. Co. v. Hunt* (1908) 42 Ind. App. 90, 83 N. E. 721; *Chicago, I. & L. Ry. Co. v. Railroad Comn.* (1906) 38 Ind. App. 439, 450, 451, 78 N. E. 338, 342, 79 N. E. 520. It must be noted that in *Tallassee F. M. Co. v. Commis-*

Outline of position taken.

39. Calling attention to these two lines of cases, it is submitted that the legislature is the only governmental body which may determine the principles upon which rates shall be regulated, and that while the legislature,

sioners' Court (1908) 158 Ala. 263, 48 So. 354, the power was granted to a local body, as to which see sec. 30, *supra*. We must distinguish from the above cases the cases in which other courts have sustained other statutes which declared that the determinations of the commissions should constitute *prima facie* evidence of what were the lawful rates: Oregon R. & N. Co. v. Campbell (1909) 173 Fed. 958; Chicago, B. & Q. R. Co. v. Jones (1894) 149 Ill. 361, 37 N. E. 247, 24 L. R. A. 141; Chicago & N. W. Ry. Co. v. Dey (1888) 35 Fed. 866, 1 L. R. A. 744; Tift v. Southern Ry. Co. (1905) 138 Fed. 753, affirmed, Southern Ry. Co. v. Tift (1907) 206 U. S. 428, 27 Sup. Ct. 709, 51 L. ed. 1124; State v. Minneapolis & St. L. R. Co. (1900) 80 Minn. 191, 83 N. W. 60; Burlington, C. R. & N. Ry. Co. v. Dey (1891) 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436; State v. Freemont, E. & M. V. R. Co. (1888) 23 Neb. 117, 36 N. W. 305 (1887) 22 Neb. 313, 35 N. W. 118, 32 A. & E. R. Cas. 426. The question of delegation of power was discussed only in the Illinois case, the cases in 173 Fed. and 35 Fed., and in State v. Missouri P. Ry. Co. (1907) 76 Kan. 467, 92 Pac. 606; Atlantic E. Co. v. Wilmington & W. R. Co. (1892) 111 N. C. 463, 16 S. E. 393, 18 L. R. A. 393, in the last two of which the remarks were dicta. (See also Corporation Comn. v. Seaboard A. L. System (1900) 127 N. C. 283, 288, 37 S. E. 266, 268). In Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Comn. (1908) 136 Wis. 146, 116 N. W. 905, 17 L. R. A. N. S. 821, the court sustained a statute which empowered the commission to determine what were reasonable rates. The point at issue in the case did not involve rates, although the court discussed that question. The order of the commission was *prima facie* evidence (136 Wis. at 158, 116 N. W. at 909, 17 L. R. A. N. S. at 828) but the court could not inquire whether the rate, regulation or service fixed by the commission were just and reasonable but only whether the order of the commission were unreasonable (136 Wis. at 165, 116 N. W. at 912, 17 L. R. A. N. S. at 831).—Portland & O. C. R. Co. v. Grand T. Ry. Co. (1858) 46 Me. 69; Vermont & M. R. Co. v. Fitchburg R. Co. (1852) 63 Mass. (9 Cush.) 369, were far different from the above: in each case the court, under statutory authority, appointed commissioners to determine the rates which under existing law one party to the action might charge the other party. State statutes upon rate regulation by commission are collected in Beale and Wyman, Railroad Rate Regulation, p. 1081 et seq. In Lindsley, Rate Regulation of Gas and Electric Lighting, p. 58 et seq., are collected the statutes dealing with that subject.

when it names specific rates, need not disclose the principles upon which it acts or even consciously adopt any principles, that body may not grant to any other organ of government any power whatever to name specific rates for future transportation without first laying down principles sufficient for the guidance of that organ, although after the legislature has determined the principles upon which rates shall be regulated it may grant to an administrative organ power to name rates in accordance with those principles, the power of that organ depending upon the completeness with which principles have been laid down for its guidance.³⁴

Discussion of state and federal authorities on rate-making.

40. Some of the courts in sustaining laws which authorized commissions to name rates for future transportation have said that, as economic conditions change from time to time, rates can be named better by a commission

³⁴ So also it seems that a legislature cannot constitutionally grant to a commission power to permit or refuse to permit combinations between competing carriers without first laying down principles for the guidance of the commission. It is obvious to any one who examines the question dispassionately that some combinations between competing carriers are decidedly in the interest of the public, that some are not injurious, while still others may prove to be against the public interest. These combinations admit of classification, and it is the duty of the legislature, when regulating them or when providing for their regulation, to declare the lines of division or the principles by which those lines may be clearly ascertained.—A statute of Minnesota which attempted to delegate to a commission an unrestrained veto power over proposed increases in the capitalization of railroads incorporated in that state was declared unconstitutional in *State v. Great N. Ry. Co.* (1907) 100 Minn. 445, 111 N. W. 289, 10 L. R. A. N. S. 250. See also *State ex rel. Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Comn.* (1908) 137 Wis. 80, 86, 117 N. W. 846, 848. Compare *State v. Kenosha E. Ry. Co.* (1911) 145 Wis. 337, 129 N. W. 600; *Schaake v. Dolley* (1911) 85 Kan. 598, 118 Pac. 80, 37 L. R. A. N. S. 877; *State v. Corvallis & E. R. Co.* (1911) 59 Ore. 450, 117 Pac. 980.

than by the legislature, which is not constantly in session.³⁵ This argument from convenience is certainly a strong one; and decisions that railroad commissions may name specific rates do not necessarily conflict with the decisions that the legislature alone may determine the principles upon which the government shall be conducted.

In declaring that a state might empower a commission to regulate charges for gas and electric service, a court has said that conditions in the several localities differed so greatly that the legislature could not justly establish uniform rates for the entire state and that it would not be practicable for the legislature itself to establish rates in each of the communities.³⁶ And the same position might properly be taken with regard to charges for transportation. In both cases it is true that the legislature cannot satisfactorily do more than declare the principles which the commission shall apply; although in neither case does

³⁵ *State v. Chicago, M. & St. P. Ry. Co.* (1888) 38 Minn. 281, 37 N. W. 782; *Georgia R. & B. Co. v. Smith* (1883) 70 Ga. 694; *Tilley v. Savannah, F. & W. R. Co.* (1881) 5 Fed. 641. See also *Louisville & N. R. Co. v. Interstate Com. Comn.* (1910) 184 Fed. 118; *McWhorter v. Pensacola & A. R. Co.* (1888) 24 Fla. 417, 5 So. 129, 2 L. R. A. 504; *Chicago & N. W. Ry. Co. v. Dey* (1888) 35 Fed. 866, 1 L. R. A. 744; *Trustees v. Saratoga G., E. L. & P. Co.* (1908) 191 N. Y. 123, 144, 83 N. E. 693, 699, 18 L. R. A. N. S. 713, 723; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Comn.* (1908) 136 Wis. 146, 159, 116 N. W. 905, 910, 17 L. R. A. N. S. 821, 829; *State v. Atlantic C. L. R. Co.* (1908) 56 Fla. 617, 47 So. 969, 32 L. R. A. N. S. 639. Compare Smalley, *Railroad Rate Control* (Publications of the American Economic Assn.) 121.

³⁶ *Trustees v. Saratoga G., E. L. & P. Co.* (1908) 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. N. S. 713. And see *Louisville & N. R. Co. v. Interstate Com. Comn.* (1910) 184 Fed. 118; *State v. Chicago, M. & St. P. Ry. Co.* (1888) 38 Minn. 281, 37 N. W. 782; *Georgia R. & B. Co. v. Smith* (1883) 70 Ga. 694. For other practical arguments in support of the delegation of power to administrative organs, see Young, *The Relation of the Executive to the Legislative Power*, *Proc. Am. Pol. Sci. Assn.*, I, 47.

it follow that the commission may be allowed to decide what those guiding principles shall be.

Some of the courts have also sustained statutes which authorized commissions to name rates upon the ground that in those statutes the legislature had declared what the law should be and had left to the commissions questions of fact.³⁷ Certainly where definite standards are

³⁷ See *Trustees v. Saratoga G., E. L. & P. Co.* (1908) 191 N. Y. 123, 145, 83 N. E. 693, 700, 18 L. R. A. N. S. 713, 723, where the commission was empowered to determine what were reasonable maximum rates; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Comn.* (1908) 136 Wis. 146, 116 N. W. 906, 17 L. R. A. N. S. 821, referred to more fully in note 33, *supra*, where the commission was empowered to determine what were reasonable rates; *State v. Chicago, M. & St. P. Ry. Co.* (1888) 38 Minn. 281, 300, 302, 37 N. W. 782, 787, 788, where the statute provided that the charges should be equal and reasonable; and *State ex rel. Webster v. Superior Court* (1912) 67 Wash. 37, 120 Pac. 861, where the statute (Laws, 1911, p. 571) provided that the commission should determine the just, reasonable or sufficient rates. In view of the illustrations used, the court apparently had this thought in mind in *Tilley v. Savannah, F. & W. R. Co.* (1881) 5 Fed. 641, 657, where the statute provided that if a railroad should charge more than a fair and reasonable rate it should be deemed guilty of extortion, and that a commission should name reasonable and just rates; and in *Chicago & N. W. Ry. Co. v. Dey* (1888) 35 Fed. 866, 874, where the statute provided that if any railroad "shall charge . . . more than a fair and reasonable rate . . . or shall make any unjust or unreasonable charge . . . the same shall be deemed guilty of extortion," and required a commission to make a schedule of reasonable and maximum rates, such schedule to be *prima facie* evidence that the rates named therein were reasonable and just maximum rates. In reference to the illustration in the case last cited we may remark in passing that in declaring that a carrier should be allowed to earn three per cent. for every act of transportation the legislature would be fixing an unpractical standard; and we may question whether in declaring that the company should earn that percentage from its business as a whole the legislature would be furnishing adequate guidance for the regulation of the separate rates. In *Georgia R. & B. Co. v. Smith* (1883) 70 Ga. 694 (1888) 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377, the statute provided that a railroad charging more than a fair and reasonable rate should be deemed guilty of extortion, and provided for the appointment of commissioners who should make schedules of just and reasonable rates. The state court decided, to use the language of the United States Supreme Court, "that it was expected, not that the legislature would itself make specific regulations as to what should in each

established by statute a grant of power to ascertain and state what rates will conform to those standards does not violate the rule that legislative power may not be delegated. This principle cannot be disputed. The only question is whether the statutes have in reality left to the commissions merely the determination of matters of fact. To this question, however, the courts have as a general rule³⁸ given but very little consideration.

On the other hand, the suggestion which has been made in support of commission-made rates³⁹ that because the legislature may for historical reasons grant some self-government to localities⁴⁰ it may delegate legislative power to other governmental organs is entirely unconvincing. The fact that there is one exception to the rule does not justify the creation of new exceptions. And

case be a proper charge, but that it would simply provide the means by which such rates should be ascertained and enforced." In *Chicago, I. & L. Ry. Co. v. Railroad Comn.* (1906) 38 Ind. App. 439, 451, 78 N. E. 338, 342, 79 N. E. 520; *Southern Ry. Co. v. Hunt* (1908) 42 Ind. App. 90, 100, 83 N. E. 721, 725, where the commission was directed, upon complaint, to determine whether the rates charged were just and reasonable, and, if not, to fix just and reasonable rates, the court spoke of the decisions of the commission as to whether a railroad's charges were just and reasonable as determinations of questions of fact. In the Indiana cases, however, the court was not discussing the question of delegation of legislative power. See also cases cited in note 33, *supra*, concerning statutes by which the rates named by commissions furnished *prima facie* evidence as to what were the lawful rates.—Compare, however, *Central of Ga. Ry. Co. v. Railroad Comn. of Alabama* (1908) 161 Fed. 925, 985, where the court declared invalid as an attempted delegation of legislative power a provision in an act of Alabama quoted in note 30, *supra*.

³⁸ See, however, *Central of Ga. Ry. Co. v. Railroad Comn. of Alabama*, cited in note 30, *supra*.

³⁹ See *Tilley v. Savannah, F. & W. R. Co.* (1881) 5 Fed. 641; and also *United States v. Grimaud* (1911) 220 U. S. 506, 516, 31 Sup. Ct. 480, 482, 483, 55 L. ed. 563 (1910) 216 U. S. 614, 30 Sup. Ct. 576, 54 L. ed. 639; *People v. Harper* (1878) 91 Ill. 357. The opinion in the case last cited is criticised in note 87, *infra*.

⁴⁰ See sec. 30, *supra*.

since the distributive clauses of the state constitutions do not apply to local governments⁴¹ but do apply to the central governments of those states, there is obviously nothing in the argument, which was made in support of rate regulation by a gas and electricity commission,⁴² that because a power may be granted to administrative officers of a locality similar power may be granted to administrative officers of the state.

Two opinions also refer to laws declaring that the judiciary may make rules of court.⁴³ But allowing an organ to regulate procedure before itself is far different from allowing an organ to make rules of substantive law. And the contention that authorizing a commission to name rates is similar to allowing the companies concerned to name their own rates⁴⁴ is likewise unsound. A com-

⁴¹ See sec. 30, *supra*.

⁴² *Trustees v. Saratoga G., E. L. & P. Co.* (1908) 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. N. S. 713.

⁴³ *State v. Chicago, M. & St. P. Ry. Co.* (1888) 38 Minn. 281, 37 N. W. 782; *Georgia R. & B. Co. v. Smith* (1883) 70 Ga. 694.

⁴⁴ *Tilley v. Savannah, F. & W. R. Co.* (1881) 5 Fed. 641, 656; *McWhorter v. Pensacola & A. R. Co.* (1888) 24 Fla. 417, 5 So. 129, 2 L. R. A. 504.—On the converse of this proposition see *Morrow v. Wipf* (1908) 22 S. D. 146, 159, 115 N. W. 1121, 1127; *People v. Board of Election Comrs.* (1906) 221 Ill. 9, 19, 77 N. E. 321, 323, where the courts also failed to notice the distinction, which is pointed out in the text, and declared that a legislature may not allow the officials of a political party to determine the method by which that party shall nominate its candidates. The opinions are unconvincing. A legislature certainly does not delegate legislative power when it allows an organization to decide such questions for itself. If those decisions were sound a law which provided that a railroad should charge two cents a mile for passenger transportation unless its appropriate officers should fix different rates, but that such officers might fix different rates, would have to be held unconstitutional as delegating legislative power to the railroad officials. The cases are parallel.—On the other hand, in *State v. Felton* (1908) 77 Ohio St. 554, 577, 84 N. E. 85, 89, the court by a large majority decided that a law which authorized party officials to prescribe the purpose, time, manner and conditions of holding a primary election and the qualification of the electors did not delegate legislative power. See also note 93, *infra*.

mission acts as an organ of government—it interferes with the conduct of third parties in matters in which the commission is not itself interested; while the officials of a railroad, although doing what some governmental organ might do, do not act as agents of the government but interfere with the conduct of others only in matters affecting the company itself.

We shall examine later the position that an administrative body may be granted discretion in the establishment of rates.⁴⁵

Discussion of position of Supreme Court on rate-making.

41. While the United States Supreme Court has sustained an order of the Interstate Commerce Commission which reduced railroad rates,⁴⁶ that decision was rendered without any discussion of the validity of the delegation of power to the commission, and in no other case has the court ever decided how much power over rates may be granted by Congress to the Interstate Commerce Commission.⁴⁷

⁴⁵ See sec. 46, *infra*.

⁴⁶ *Interstate Com. Comn. v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946; *Interstate Com. Comn. v. Chicago, B. & Q. R. Co.* (1910) 218 U. S. 113, 30 Sup. Ct. 660, 54 L. ed. 959. See also *Interstate Com. Comn. v. Illinois C. R. Co.* (1910) 215 U. S. 452, 30 Sup. Ct. 155, 54 L. ed. 280, which sustained an order of the commission arising out of discrimination in service without any reference to the constitutional question; and *Louisville & N. R. Co. v. Interstate Com. Comn.* (1910) 184 Fed. 118.

⁴⁷ There is a dictum that "Congress might itself prescribe the rates, or it might commit to some subordinate tribunal this duty:" *Interstate Com. Comn. v. Cincinnati, N. O. & T. P. Ry. Co.* (1897) 167 U. S. 479, 494, 17 Sup. Ct. 896, 898, 42 L. ed. 243. See also *Texas & P. Ry. Co. v. Interstate Com. Comn.* (1896) 162 U. S. 197, 216, 16 Sup. Ct. 666, 674, 40 L. ed. 940; dissenting opinion in *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 464, 10 Sup. Ct. 462, 702, 704, 33 L. ed. 970; and notes 61, 62, *infra*. But this dictum does little, if anything, towards set-

The question whether the distribution of powers by the state constitutions has been violated by any administrative order concerning rates has been before that court only in the Railroad Commission Cases,⁴⁸ where the state court had already declared that the law there considered did not violate the state constitution⁴⁹—a decision which was binding upon all other courts.⁵⁰ The United States Supreme Court did briefly announce its concurrence with the interpretation which the state court had placed upon the state constitution.⁵¹ But the attention of all the

ting the point now under discussion. And the same comment must be made upon the following sentence from the opinion in *Interstate Com. Comm. v. Chicago G. W. Ry. Co.* (1908) 209 U. S. 108, 117, 28 Sup. Ct. 493, 496, 52 L. ed. 705, "It is unnecessary to define the full scope and meaning of the prohibition found in sec. 3 of the Interstate Commerce Act [relating to discriminations], or even to determine whether the language is sufficiently definite to make the duties cast on the Interstate Commerce Commission ministerial, and therefore such as may legally be imposed upon a ministerial body, or legislative, and therefore, under the Federal Constitution, a matter for congressional action, for, within any fair construction of the terms 'undue or unreasonable,' the findings of the circuit court place the action of the railroads outside the reach of condemnation."

⁴⁸ (1886) 116 U. S. 307, 347, 352, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191, 29 L. ed. 636; reversing *Farmers' L. & T. Co. v. Stone* (1884) 20 Fed. 270; *Illinois C. R. Co. v. Stone* (1884) 20 Fed. 468.

⁴⁹ *Stone v. Yazoo & M. V. R. Co.* (1885) 62 Miss. 607, 645, 21 A. & E. R. Cas. 6, 16, where the only reference to the subject is as follows: "The act creating the railroad commission is not violative of the 14th Amendment of the Constitution of the United States, or of any provision of the constitution of the state, in that it creates a commission and charges it with the duty of supervising railroads;" unless there is some reference to the subject in the declaration, "We hold that the state had the right to create an agency of the state to exercise such supervision as it may lawfully employ over railroads within its limits." See comment on *Stone v. Natchez, J. & C. R. Co.* in note 52, *infra*.

⁵⁰ "If a state court has decided that a law is in harmony with the state constitution its validity, so far as the state constitution is concerned, cannot be questioned elsewhere:" Patterson, *The United States and the States Under the Constitution*, 2d ed., p. 282. See also cases cited in notes 45, 47 in Chapter 3, *infra*.

⁵¹ The court stated the contention that the act conferred both legislative

courts which considered that law was devoted almost exclusively to other constitutional questions,⁵² so that it

and judicial powers on the commission and was therefore repugnant to the constitution of Mississippi, and made simply this reply, "The Supreme Court of Mississippi has decided . . . that the statute is not repugnant to the constitution of the state 'in that it creates a commission and charges it with the duty of supervising railroads.' To this we agree, and this is all that need be decided in this case:" 116 U. S. 336, 6 Sup. Ct. 347, 29 L. ed. 646.—In *Chicago & N. W. Ry. Co. v. Dey* (1888) 35 Fed. 966, 875, 1 L. R. A. 744, in answer to the contention that legislative power was delegated to the commission in the statute there considered, the court said that "the validity of the act of the state of Mississippi, delegating like power to a board of railroad commissioners, was before the Supreme Court of the United States, and although this specific objection was made by counsel to its validity, the act was sustained," without, however, any special reference being made to this question in the opinion.—An examination of unreported portions of the briefs filed in the Supreme Court shows that counsel did there discuss, with ordinary ability, the question of delegation of legislative power to an administrative body. And in 62 Miss. at 626 there are references to the question of delegation of power in a few authorities cited in a brief against the law. Were it not for the latter, we might say that, so far as shown by the reports of any of the cases, the contention that the statute was not in accordance with the distribution of powers by the state constitution might have meant merely that if the state had any control whatever over the rates of a railroad the charter of which had granted to it in general terms the right to regulate its own rates, that control could be exercised only through a strictly judicial body. In *Illinois C. R. Co. v. Stone* (1884) 20 Fed. 468, 471, the court said, "The question of what is a reasonable compensation in such cases is one alone for judicial ascertainment, when not fixed by the charter, and no power is reserved therein, thereafter to fix it."

⁵² In addition to the cases cited above, see *Stone v. Natchez, J. & C. R. Co.* (1885) 62 Miss. 646, 21 A. & E. R. Cas. 17, which involves simply the impairment of contract clause. The court there says that the commission merely secured conformity by the road with the implied condition in its charter to carry for reasonable rates. "The final test of reasonableness of rates is not with the railroad commission, but, as before, with the government, through its judiciary. Fixing rates by the commission is not final and conclusive against a railroad company. It is only *prima facie* correct, and may be tested by the courts. If the action of the commission is just, it should prevail. If it is not, it may be assumed that it will not. Of that none should complain. The concession made in the bill of the appellee of the right of judicial control to prevent extortion and unjust discrimination is an admission of the right of government control; and if the state can control or supervise at all it may select the agency through which to

seems that even if the Supreme Court had had the right to pass upon the validity of the delegation of power, its decision upon that point would be of no greater value as a precedent than was that casual decision upon the commerce clause in the Granger Cases⁵³ which was overruled in *Wabash, St. L. & P. Ry. Co. v. Illinois*.⁵⁴

In *Chicago, M. & St. P. Ry. Co. v. Tompkins*⁵⁵ and *Minneapolis & St. L. R. Co. v. Minnesota*⁵⁶ the question of the delegation of legislative power was not discussed either by the court of last resort or by the lower courts. In *Georgia R. & B. Co. v. Smith*,⁵⁷ while the court referred to the decision of the state court upon the constitutionality of the delegation of power, it properly refrained from comment thereon. And in *Reagan v. Farmers' L. & T. Co.*⁵⁸ it had been shown in the lower court⁵⁹ that the state of Texas had considered it advisable to amend its constitution in order to authorize the regulation of rates by commission; therefore, while the Supreme Court did say⁶⁰ that a state may regulate by means of a commission, that case certainly does not show that in the absence of an express provision in the state constitution a legisla-

exert its right." But it does not follow that the legislature may select an agency as freely as the state itself might do it, and that point is not discussed.

⁵³ *Chicago, B. & Q. R. Co. v. Iowa* (1876) 94 U. S. 155, 163, 24 L. ed. 94; *Peik v. Chicago & N. W. Ry. Co.* (1876) 94 U. S. 164, 177, 178, 24 L. ed. 97.

⁵⁴ (1886) 118 U. S. 557, 566-569, 7 Sup. Ct. 4, 7-9, 30 L. ed. 244.

⁵⁵ (1900) 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417 (1898) 90 Fed. 363.

⁵⁶ (1902) 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151; *State v. Minneapolis & St. L. R. Co.* (1900) 80 Minn. 191, 83 N. W. 60.

⁵⁷ (1888) 128 U. S. 174, 178, 9 Sup. Ct. 47, 48, 32 L. ed. 377.

⁵⁸ (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014.

⁵⁹ *Mercantile T. Co. v. Texas & P. Ry. Co.* (1892) 51 Fed. 529, 532.

⁶⁰ 154 U. S. at 393, 394, 14 Sup. Ct. at 1053, 38 L. ed. at 1022.

ture may bestow upon a commission as much power over rates as the legislature itself might exercise.

The court of last resort has said at times that the naming of specific rates for future transportation is a legislative power,⁶¹ and at times that it is an administrative power,⁶² and the court has also appeared undecided upon this point.⁶³ Yet, as we have already observed⁶⁴ that there are some powers which may be exercised by the legislature itself but the exercise of which is not confined strictly to the legislature and may, therefore, be assigned by it to an administrative organ, these cases need not confuse us. Taken together they indicate no more than that a commission may not name specific rates without legislative authorization but that a commission may be authorized to ascertain facts as to rates and to state in specific form principles established by the legislature.

Decisions of Supreme Court on delegation of power.

42. The court has sustained several federal⁶⁵ and state⁶⁶ statutes which delegated power to administrative or executive officers and which were attacked upon the

⁶¹ *McChord v. Louisville & N. R. Co.* (1902) 183 U. S. 483, 495, 22 Sup. Ct. 165, 169, 46 L. ed. 289; *Interstate Com. Comn. v. Alabama M. Ry. Co.* (1897) 168 U. S. 144, 162, 18 Sup. Ct. 45, 47, 42 L. ed. 414; *Interstate Com. Comn. v. Cincinnati, N. O. & T. P. Ry. Co.* (1897) 167 U. S. 479, 499, 500, 501, 505, 506, 511, 17 Sup. Ct. 896, 900, 901, 902, 903, 905, 42 L. ed. 243. See also notes 18, 19, *supra*.

⁶² *St. Louis & S. F. Ry. Co. v. Gill* (1895) 156 U. S. 649, 663, 15 Sup. Ct. 484, 490, 39 L. ed. 567; *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 394, 14 Sup. Ct. 1047, 1053, 38 L. ed. 1014. See also note 52, *supra*.

⁶³ *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 397, 14 Sup. Ct. 1047, 1054, 38 L. ed. 1014.

⁶⁴ Secs. 29, 36, *supra*.

⁶⁵ *Union B. Co. v. United States* (1907) 204 U. S. 364, 27 Sup. Ct. 367, 51 L. ed. 523, and cases there cited. And see *St. Louis, I. M. & S. Ry. Co. v. Taylor* (1908) 210 U. S. 281, 287, 28 Sup. Ct. 616, 617, 52 L. ed. 1061; *Hannibal B. Co. v. United States* (1911) 221 U. S. 194, 205, 31 Sup. Ct.

ground that the power delegated was legislative, the court saying that the officers were merely authorized to ascertain facts and to apply the law in accordance with those facts. In some of the cases this explanation of the statute is a rather strained one;⁶⁷ but the actual decisions in those cases are more than off-set by the reasons which the court gave in support of the decisions.⁶⁸

Indeed, the correct rule has nowhere been stated more clearly than in the recent case of *Interstate Com. Comm. v. Goodrich Transit Co.*,⁶⁹ in which a grant to the commission of power to prescribe a uniform system of accounting and book-keeping was sustained.⁷⁰ In that case the court said, "The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."⁷¹

603, 606, 55 L. ed. 699; *Monongahela B. Co. v. United States* (1910) 216 U. S. 177, 30 Sup. Ct. 356, 54 L. ed. 435; *United States v. Grimaud* (1911) 220 U. S. 506, 517, 518, 31 Sup. Ct. 480, 483, 55 L. ed. 563.

⁶⁶ Red "C" *O. M. Co. v. Board of Agriculture* (1912) 222 U. S. 380, 32 Sup. Ct. 152, 56 L. ed. 240.

⁶⁷ Consider criticisms in dissenting opinion in *Field v. Clark*, (1892) 143 U. S. 649, 697, 12 Sup. Ct. 495, 506, 36 L. ed. 294; *Gilhooly v. City of Elizabeth* (1901) 66 N. J. L. 484, 486, 49 Atl. 1106, 1107; and criticism of similar legislation in *Prentice and Egan, The Commerce Clause of the Federal Constitution*, 313.

⁶⁸ On the bearing of *Field v. Clark* (1892) 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294, on railroad rate regulation, see *Olney, Railroad Rate Making by Congress*, 181 N. A. Rev. 490; *Peck, Governmental Regulation of Railroad Rates*, 13 Am. Lawyer, 485, 486; *Whitney, The Reciprocity Acts of 1890*, 31 Am. L. Reg. 186, 187.

⁶⁹ (1912) 224 U. S. 194, 32 Sup. Ct. 436, 56 L. ed. 729.

⁷⁰ On such legislation see section 46, *infra*.

⁷¹ 224 U. S. at 214, 32 Sup. Ct. at 441, 56 L. ed. at 737.

In another recent case ⁷² the court has decided that a federal statute which authorized the Secretary of Agriculture to regulate the occupancy and use of the forest reservations of the United States indicated sufficiently the policy which was to be enforced by the Secretary and therefore the making of regulations by him was not the exercise of a power which was strictly legislative.⁷³ So interpreted the decision certainly supports the position taken in this chapter.⁷⁴

The court has sustained legislation which delegated to executive officers distinctively congressional power concerning the Philippine Islands.⁷⁵ But those decisions

⁷² *United States v. Grimaud* (1911) 220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563. The decision was followed in *Light v. United States* (1911) 220 U. S. 523, 31 Sup. Ct. 485, 55 L. ed. 570. The statute in question had been declared unconstitutional in *United States v. Grimaud* (1909) 170 Fed. 205, and that decision had been affirmed by a divided court (1910) 216 U. S. 614, 30 Sup. Ct. 576, 54 L. ed. 639.

⁷³ 220 U. S. at 515, 516, 31 Sup. Ct. at 482, 55 L. ed. at 567.

⁷⁴ The court also referred to the rule that powers of local self-government may be granted to the localities affected, a rule which has no bearing upon the legislation under consideration, and it referred twice to *Brodline v. Revere* (1903) 182 Mass. 599, 66 N. E. 607, which had been improperly based on that rule. And the court made other references which did not fully recognize the limitations to the extent to which an administrative organ may be allowed to "fill up details." But in view of the facts of the case and the reason given earlier in the opinion these expressions may be disregarded.—The court also pointed out that in grazing their sheep upon the forest reserve without a permit the defendants were making an unlawful use of property which belonged to the government. And it must be conceded that even if the statute under consideration were invalid that fact would not warrant the appropriation of public property by individuals. This in itself is certainly a sufficient ground for the decision in *Light v. United States* (1911) 220 U. S. 523, 31 Sup. Ct. 485, 55 L. ed. 570, if not for that in *United States v. Grimaud* (1911) 220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563. See also note 115, *infra*.

⁷⁵ *United States v. Heinszen* (1907) 206 U. S. 370, 27 Sup. Ct. 742, 51 L. ed. 1098; *Dorr v. United States* (1904) 195 U. S. 138, 24 Sup. Ct. 808, 49 L. ed. 128. See also *The Louisa Simpson* (1871) 2 Sawyer, 57, 61, 71, 15 Fed. Cas. 953, 955, 958.

cannot justify similar legislation for territory which is under the Constitution of the United States.

The court has also sustained a federal law which allowed local authorities to make certain "supplementary regulations" concerning the acquisition of title to public lands.⁷⁶ The opinion does not contain a thoroughly satisfactory discussion of the question involved,⁷⁷ yet the reason for the decision may be said to be that the court thought that the purpose for which the power had been given to Congress had been sufficiently observed by the regulations which Congress had itself prescribed, and as vast interests would suffer from a decision that the federal statute was unconstitutional the court would not so decide where the invalidity was not clear.⁷⁸ As the court did not notice it, we need not lay much stress upon the fact that the local authorities were not merely administrative and that apparently the "supplementary regulations" were legitimate exercises of local self-government.⁷⁹ The decision that the power to make those "sup-

⁷⁶ *Butte C. W. Co. v. Baker* (1905) 196 U. S. 119, 25 Sup. Ct. 211, 49 L. ed. 409. See also *United States v. Ormsbee* (1896) 74 Fed. 207.

⁷⁷ See 196 U. S. 125, 126, 25 Sup. Ct. 213, 49 L. ed. 412. The question is how far the power of Congress is exclusive. The court does not show whether the owner of the land had actually granted to its agent, Congress, permission to delegate a portion of the power committed to it.—Granting that Congress thought that it was acting for the best, that fact does not answer the constitutional question.—The question is not whether the power is legislative in its nature, but whether it is entrusted to the exclusive control of Congress, so that even if the court could say boldly that neither the statute nor the "supplementary regulations" were in any aspect legislative in character the problem would not be entirely solved.

⁷⁸ A statute must always be upheld unless its invalidity is clear, regardless of the amount involved.

⁷⁹ In this case the regulations were made by a state; but a state could not exercise such power over interstate rates: see *Stoutenburgh v. Hennick* (1889) 129 U. S. 141, 9 Sup. Ct. 256, 32 L. ed. 637; and also *McCornick v. Western U. T. Co.* (1879) 79 Fed. 449, 451; compare *In re Rahrer* (1891) 140 U. S. 545, 11 Sup. Ct. 865, 35 L. ed. 572.—Perhaps the statute was

plementary regulations'' had not been clearly shown to belong exclusively to Congress, while it may have some bearing upon the question how far the power of Congress under the commerce clause is exclusive, does not constitute a decision upon the extent to which the power of Congress is exclusive under any clause of the Constitution other than the one considered in that case.⁸⁰

The Supreme Court of the United States has also referred to the distribution of governmental powers in several cases involving state legislation, but its remarks in those cases were of comparatively little value.⁸¹

analogous to that considered in *In re Rahrer*, and merely withdrew a withdrawable federal restraint upon a state's power over property within its borders. Between the exclusive power of the federal government and the exclusive power of the states there are fields of jurisdiction which Congress may place under state control, which are of such a nature that we might say that the state and federal governments held them in common because of the vicinage to the exclusive domains of each, were it not for the rule of the supremacy of federal law, a rule found in the Constitution but sometimes misapplied: in addition to *In re Rahrer* see *Patterson, The United States and the States Under the Constitution*, 2d ed., p. 269, note; *Halter v. Nebraska* (1907) 205 U. S. 34, 41, 42, 27 Sup. Ct. 419, 422, 51 L. ed. 696; and, by way of analogy, sec. 29, *supra*. Thus, while Congress may not authorize the states to coin money it may authorize them to tax federal agencies which are within their borders: see *Patterson*, *op. cit.*, p. 48; and also U. S. Constitution, Art. I, sec. 10.—In connection with this note in general consider also *Kansas v. Colorado* (1907) 206 U. S. 46, 92, 27 Sup. Ct. 655, 665, 51 L. ed. 950; *Allen v. Riley* (1906) 203 U. S. 347, 27 Sup. Ct. 95, 51 L. ed. 216; *Woods & Sons v. Carl* (1906) 203 U. S. 358, 27 Sup. Ct. 99, 51 L. ed. 219; 2 *Am. Pol. Sci. Rev.* 347.

⁸⁰ "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details:" *Wayman v. Southard* (1825) 10 *Wheat.* 1, 43, 6 L. ed. 253.

⁸¹ *Michigan C. R. Co. v. Powers* (1906) 201 U. S. 245, 26 Sup. Ct. 459, 50 L. ed. 744, where the distribution was clearly directed by the state constitution; *Dreyer v. Illinois* (1902) 187 U. S. 71, 23 Sup. Ct. 28, 47 L. ed. 79; *St. Louis C. C. Co. v. Illinois* (1902) 185 U. S. 203, 22 Sup. Ct. 616, 46 L. ed. 872. The two latter cases had been taken up from the state court of last resort. The rule as to the distribution of governmental pow-

Ascertainment of facts.

43. Turning again to the decisions of state courts, we must note that they have frequently sustained legislation by which administrative officers were empowered to apply the law in accordance with facts to be ascertained by those officers. Thus they have sustained legislation by which a commission was authorized to mark boundary lines between counties,⁸² a commission was authorized

ers is distinctly separate from other rules of the constitutions, however much laws which violate that rule may also violate other rules. See also *Soliah v. Heskin* (1912) 222 U. S. 522, 32 Sup. Ct. 103, 56 L. ed. 294; *Welch v. Swasey* (1909) 214 U. S. 91, 104, 29 Sup. Ct. 567, 570, 53 L. ed. 923. The court said in *Atlantic C. L. R. Co. v. North C. Corp. Comm.* (1907) 206 U. S. 1, 19, 27 Sup. Ct. 585, 591, 51 L. ed. 933, that state regulation of railroads "may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end." The case came up from the supreme court of the state, and the question of delegation of power was not considered. Every one must admit that a legislature may confer some power upon commissions. But the case does nothing whatever towards clearing up the question of how much power a legislature may bestow upon a commission without violating that distribution of powers which is usually made by the constitutions.

⁸² *Trinity County v. Mendocino County* (1907) 151 Cal. 279, 90 Pac. 685. Although the line was marked incorrectly it constituted the legal boundary. In *Kennedy v. Mayor* (1902) 24 R. I. 461, 53 Atl. 317, the court sustained a law which directed the appointment of a commission to divide a city into wards and voting-districts. The correctness of the decision is not quite so clear as the correctness of the decision in *Trinity County v. Mendocino County*, but it seems to be sound. See also *Hunter v. City of Tracy* (1908) 104 Minn. 378, 383, 116 N. W. 922, 924. *Rouse v. Thompson* (1907) 228 Ill. 522, 81 N. E. 1109, was different from the above cases. In it the court declared unconstitutional an act authorizing political committees to establish delegate districts in their respective counties. The decision can be supported, if at all, only upon the ground that so much discretion was allowed to the committees that their decisions would be of a legislative nature, and that the committees were of such a character that legislation by them could not be justified as exercises of local self-government. But while the court uses language which taken alone would indicate that it considered the work strictly legislative in character, it deprives that language of any importance by apparently admitting that the work could be entrusted to an administrative organ and insisting that the committees could not constitutionally be made governmental organs. In taking

to determine the efficiency of a voting-machine the use of which, if efficient, was directed by law,⁸³ examining boards were authorized to inquire into the qualifications of persons seeking to exercise designated public occupations and to license those who were properly qualified,⁸⁴

the latter ground the court seems to be in error: see 8 Cyc. 831; *Scholle v. State* (1900) 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411; *St. Louis, I. M. & S. Ry. Co. v. Taylor* (1908) 210 U. S. 281, 287, 28 Sup. Ct. 616, 617, 52 L. ed. 1061; dissenting opinion in *Rouse v. Thompson*; discussion of this case in 21 Harv. L. Rev. 215, 216.

⁸³ *Elwell v. Comstock* (1906) 99 Minn. 261, 109 N. W. 113, 698, 7 L. R. A. N. S. 621. See also *Vandalia R. Co. v. Railroad Comn.* (1913) Ind., 101 N. E. 85.

⁸⁴ *Ex parte McManus* (1907) 151 Cal. 331, 90 Pac. 702, state board of architecture—see concurring opinion; *In re Thompson* (1904) 36 Wash. 377, 78 Pac. 899, state board of dental examiners; *State v. Briggs* (1904) 45 Ore. 366, 77 Pac. 750, 78 Pac. 361, state board of barber examiners; *Ex parte Whitley* (1904) 144 Cal. 167, 77 Pac. 879, state board of dental examiners; *Ex parte Gerino* (1904) 143 Cal. 412, 77 Pac. 166, 66 L. R. A. 249, state board of medical examiners; *State v. Thompson* (1901) 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950, state auditor authorized to license persons of good character to make books on horse races at race courses of good repute; *State v. Heinemann* (1891) 80 Wis. 253, 49 N. W. 818, state board of pharmacy. In *People v. Reid* (1912) 151 N. Y. App. Div. 324, 136 N. Y. Supp. 428, the court sustained a statute which authorized the board of dental examiners to revoke a license obtained improperly. See also *Red "C" O. M. Co. v. Board of Agriculture* (1912) 222 U. S. 380, 32 Sup. Ct. 152, 56 L. ed. 240; *Baltimore & O. R. Co. v. Railroad Comn.* (1912) 196 Fed. 690; *State v. Loden* (1912) 117 Md. 373, 83 Atl. 564; *State v. Crombie* (1909) 107 Minn. 166, 119 N. W. 658; *Arwine v. Board of Medical Examrs.* (1907) 151 Cal. 499, 91 Pac. 319; *State v. Chittenden* (1906) 127 Wis. 468, 107 N. W. 500; *Hildreth v. Crawford* (1884) 65 Iowa, 339, 21 N. W. 667; U. S. Rev. Stats., secs. 4439-4442, 5 Fed. Stats. An. 398-400. And there have been a number of cases in which similar statutes were sustained without any consideration of the question of delegation of legislative power. *Contra*, *Harmon v. State* (1902) 66 Ohio St. 249, 64 N. E. 117, 58 L. R. A. 618, where a statute which authorized examiners to license steam engineers who should be found "trustworthy and competent" was declared invalid on the ground that it delegated legislative power. The only case cited by the court was *Matthews v. Murphy*, referred to in note 87, *infra*, and it is not clear that that case turned upon the question of delegation of legislative power. Compare *State v. Gardner* (1898) 58 Ohio St. 599, 51 N. E. 136, 41 L. R. A. 689. In connection with *Harmon v. State* consider also cases cited in note 87, *infra*.

a chief of police was authorized to determine whether moving pictures were obscene or immoral and to refuse to permit their exhibition if they were objectionable in such respect,⁸⁵ state boards were authorized to issue quarantine and other regulations for the protection of the health of the community,⁸⁶ and other similar or

⁸⁵ *Block v. City of Chicago* (1909) 239 Ill. 251, 87 N. E. 1011.

⁸⁶ *Pierce v. Doolittle* (1906) 130 Iowa, 333, 106 N. W. 751, 6 L. R. A. N. S. 143; *Blue v. Beach* (1900) 155 Ind. 121, 56 N. E. 89, 50 L. R. A. 64. In *State v. Snyder* (1912) 131 La. 145, 59 So. 44, the court even sustained a statute which authorized the state board of health to promulgate a sanitary code. See also *Isenhour v. State* (1901) 157 Ind. 517, 60 N. E. 40; *Hurst v. Warner* (1894) 102 Mich. 238, 60 N. W. 440, 26 L. R. A. 484; *Koppala v. State* (1907, 1908) 15 Wyo. 398, 414, 418, 89 Pac. 576, 579, 93 Pac. 662, 663; *Cooper v. Schultz* (1866) 32 How. Pr. (N. Y.) '107 (in the last of which the courts sustained a broad grant of power to commissioners appointed by the governor and senate: see pp. 112, 124); *Walker v. Towle* (1901) 156 Ind. 639, 59 N. E. 20, 53 L. R. A. 749; and the following cases in which live stock quarantine regulations were sustained: *State v. McCarty* (1912) 5 Ala. Ap. 212, 59 So. 543; *State v. Southern Ry. Co.* (1906) 141 N. C. 846, 54 S. E. 294; *Commonwealth v. Cooper* (1902) 27 Pa. Co. Ct. 199; *State v. Rasmussen* (1900) 7 Idaho, 1, 11, 59 Pac. 933, 936, 52 L. R. A. 78. In *Arbuckle v. Pflaeging* (1912) 20 Wyo., 123 Pac. 918, the court sustained a statute for the prevention of the spread of disease among animals which authorized the state veterinarian, when necessary, to require their spraying or dipping. In *Ex parte Cox* (1883) 63 Cal. 21, where a statute was declared unconstitutional, too broad a power had been granted to the viticultural commissioners. In *State v. Burdge* (1897) 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157, the court may have decided correctly in sustaining the same objection to a statute (as interpreted by the board of health) which dealt with dangerous contagious diseases. But in *Schaezlein v. Cabaniss* (1902) 135 Cal. 466, 67 Pac. 755, 56 L. R. A. 733, the court seems to have been in error in declaring unconstitutional a statute which provided that if in any factory there were produced dangerous substances that were liable to be inhaled by the employees, and it appeared to the commissioner of labor statistics that by the use of some mechanical contrivance such inhalation could be to a great extent prevented, he should require the use of such contrivance. With that case compare, in addition to the cases cited above, *Arms v. Ayer* (1901) 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277, which concerned a law conferring upon factory inspectors power as to the erection of fire escapes; *State v. Vickens* (1905) 186 Mo. 103, 84 S. W. 908, which concerned a law conferring upon factory inspectors powers the extent of which is not clearly

supposedly similar delegations of power were made.⁸⁷

While the courts have not always sustained statutes upon those subjects, partly because some of the statutes which were declared unconstitutional differed in charac-

shown in the opinion; and *Spiegler v. City of Chicago* (1905) 216 Ill. 114, 128, 74 N. E. 718, 722, which concerned an ordinance which declared that devices, to be approved by the commissioner of public works, should be placed upon oil-wagons to prevent the spilling of oil.

⁸⁷ See page 69 and notes 82, 86, *supra*; language of court in *Central of Ga. Ry. Co. v. Railroad Comn.* (1906) 161 Fed. 925, at 986; and *Colorado & S. Ry. Co. v. State R. Comn.* (1913) 54 Colo. 64, 129 Pac. 106; *Jones v. Belzoni Drainage Dist.* (1912) 102 Miss., 59 So. 921; *State v. Corvallis & E. R. Co.* (1911) 59 Ore. 450, 117 Pac. 980; *Schaake v. Dolley* (1911) 85 Kan. 598, 118 Pac. 80, 37 L. R. A. N. S. 877; *State v. Kenosha E. Ry. Co.* (1911) 145 Wis. 337, 129 N. W. 600; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Comn.* (1908) 136 Wis. 146, 117 N. W. 846, 17 L. R. A. N. S. 821; *Coopersville C. Co. v. Lemon* (1908) 163 Fed. 145; *St. Louis, I. M. & S. Ry. Co. v. Neal* (1906) 83 Ark. 591, 98 S. W. 958, affirmed as to this point in *St. Louis, I. M. & S. Ry. Co. v. Taylor* (1908) 210 U. S. 281, 287, 28 Sup. Ct. 616, 617, 52 L. ed. 1061. In *Hand v. Stapleton* (1903) 135 Ala. 156, 33 So. 689, commissioners were directed to construct county buildings at a new location if they should find that the work could be paid for without an increase in the tax rate. In *People v. Harper* (1878) 91 Ill. 357, commissioners were authorized to name inspection fees: the legislature stated the principle to be followed, though the court does not dwell on this fact but sustains the statute with unsound reasoning. See also *Merchants Exchange v. Knott* (1908) 212 Mo. 616, 111 S. W. 565. In *Lothrop v. Stedman* (1875) 42 Conn. (Supp.) 583, Fed. Cas. No. 8519, a commissioner was directed to determine and announce whether a company made up a deficiency in its assets, thus avoiding a conditional repeal of its charter. Local option and similar laws have been frequently sustained upon the ground that the power delegated was merely that of determining questions of fact. It seems that that ground does not furnish a correct basis for those decisions: see note 7, *supra*. It may, possibly, answer objections to statutes considered in *Soliah v. Cormack* (1908) 17 N. D. 393, 401, 402, 117 N. W. 125, 128; *State v. Bryan* (1905) 50 Fla. 293, 369, 370, 39 So. 929, 953; *Leeper v. State* (1899) 103 Tenn. 500, 524, 53 S. W. 962, 967, 48 L. R. A. 167, 172 (and see *State v. Storey* (1909) 51 Wash. 630, 99 Pac. 878; *Iowa L. I. Co. v. East M. L. I. Co.* (1900) 64 N. J. L. 340, 347, 45 Atl. 762, 765); and to some portions of the statute considered in *In re Gilbert E. Ry. Co.* (1877) 70 N. Y. 361, 366, 374; *In re New Y. E. R. Co.* (1877) 70 N. Y. 327, though it seems that other portions of the New York statute can be supported better, if not only, upon the ground that the power was granted to local authorities: see page 50, *supra*. A statute which authorized county commissioners to determine the

ter from those which were sustained and partly because some courts have taken a stricter view of the limitations upon delegations of power by the legislature than have been taken by other courts, it seems clear that constitutional statutes upon those subjects may be framed. Such questions, for instance, as the appropriate preventive of the spread of smallpox, and whether a man possesses the normal qualifications of an architect, are undeniably questions of fact.

But there is a clear difference between determining the precise application of a law established by the legislature and stating in specific form a regulation which is

width of tires which must be used for the transportation of heavy loads upon the public roads of their respective counties, was sustained in *State v. Messenger* (1900) 63 Ohio St. 398, 59 N. E. 105, not only upon the ground that a power of local government was thereby granted to local authorities, but also upon the ground that those authorities were directed to determine questions of fact. In *People v. Delaware & H. C. Co.* (1898) 32 N. Y. App. Div. 120, 52 N. Y. Supp. 850, affirmed (1901) 165 N. Y. 362, 59 N. E. 138, the court decided that legislative power was not delegated by a statute which empowered commissioners, acting judicially, it was said, to determine the necessity of railroad accommodations. And statutes authorizing commissions to issue orders concerning the construction and operation of railroads have been enforced without any consideration of the question of delegation of legislative power in a number of cases. On the other hand, in *Noel v. People* (1900) 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, the court decided that legislative power was delegated by a statute which granted to a board of pharmacy an unconditional power to say, as to some parts of the state, what individuals who were not registered pharmacists should be permitted to sell patent and proprietary medicines and domestic remedies, and under what restrictions those drugs should be sold, although the court admitted the validity of that part of the statute which provided that no one might sell medicines which he had prepared or compounded himself unless he were a registered pharmacist. And in *Matthews v. Murphy* (1901) 23 Ky. L. Rep. 750, 63 S. W. 785, 54 L. R. A. 415, the court decided that the state board of health might not revoke a license to practice medicine because of "grossly unprofessional conduct of a character calculated to deceive or defraud the public," although admitting the validity of that part of the statute which authorized the board to pass upon the qualifications of persons seeking licenses to practice medicine: yet it is doubtful whether that case turned upon the question of delegation of legislative power.

not the application of a law established by the legislature. Or, to refer more definitely to railroad commissions, while a legislature certainly may authorize such a commission to investigate questions concerning rates and to state in specific form the rates which may be charged thereafter if it has clearly established the principles which are to be applied by the commission, the cases which we have just considered do not warrant the assertion that the legislature may endow the commission with a wide discretion as to the rates which shall be fixed. We have seen from other authorities that while the legislature may authorize a commission to ascertain facts and to apply the law in accordance with those facts, it must point out the facts which are to be ascertained, it must determine the law which is to be applied.⁸⁸

Contingent legislation—bearing on general principles.

44. The courts have also held that a statute the operation of which depends upon a contingency does not necessarily delegate legislative power. It may declare completely the principles of governmental action although other forces determine the result of that declaration of principles. Thus the treatment of a foreign corporation may be made to depend upon the treatment which the home state of that corporation extends to corporations of the state whose legislation is being considered;⁸⁹ the leg-

⁸⁸ See cases cited in note 29, *supra*.

⁸⁹ *People v. Fire Assn. of Phila.* (1883) 92 N. Y. 311; *Phoenix I. Co. v. Welch* (1883) 29 Kan. 672; *Home I. Co. v. Swigert* (1882) 104 Ill. 653; and see *Talbot v. Fidelity & C. Co.* (1891) 74 Md. 536, 545, 22 Atl. 395, 398, 13 L. R. A. N. S. 584. *Contra*, *Clark & Murrell v. Port of Mobile* (1880) 67 Ala. 217. It is submitted that, while the decisions in support of the statutes are sound, some of the cases which the Kansas and Illinois courts cite with approval were not legitimate instances of contingent legislation. In *Brig Aurora v. United States* (1813) 7 Cranch, 382, 3 L. ed. 378, the

islature may provide that the pay of an officer of the state militia in active service with troops also in active service shall be the same as that of an officer of a corresponding grade of the United States army;⁹⁰ commissioners may be authorized to construct new county buildings if they shall find that the work will not require an increase in the tax rate,^{90a} to remove de facto a county seat upon the erection of suitable buildings at a new location,⁹¹ or to remove the county records to another town and erect a court house there if the town or its citizens shall, to the satisfaction of the commissioners and without expense to the county, provide suitable temporary accommodations and a suitable building site;⁹² a legislature may require a railroad company to stop its trains at a designated place if individuals shall, within a given time, there erect a station building and convey it, with the land thereunder, to the company;⁹³ a legislature may repeal the charter of a

court sustained an act by which an embargo resulted upon action by Great Britain. And in *Field v. Clark* (1892) 143 U. S. 649, 12 Sup. Ct. 495, 36 L. ed. 294, the court sustained a federal reciprocity statute in which the contingency was not indicated as definitely as in the above statutes.

⁹⁰ *James v. Walker* (1910) 141 Ky. 88, 132 S. W. 149.

^{90a} *Hand v. Stapleton* (1903) 135 Ala. 156, 33 So. 689.

⁹¹ *Peck v. Weddell* (1867) 17 Ohio St. 271.

⁹² *Walton v. Greenwood* (1872) 60 Me. 356. See also decision in *Fournier v. Commissioners of Aroostook County* (1912) 109 Me. 48, 82 Atl. 545.

⁹³ *State v. New Haven & N. Co.* (1876) 43 Conn. 351. The court gave but slight consideration to the question. In *Mayor v. Clunet* (1865) 23 Md. 449, 466-470, after a fuller discussion, the court sustained an ordinance for the opening of a street which provided that it should not go into effect until designated individuals had adjusted claims against the city arising out of a prior ordinance for the same purpose which had been repealed after it had been partly executed. See also *State v. Montgomery* (1912) 176 Ala., 59 So. 294, 299, 300; *State v. Storey* (1909) 51 Wash. 630, 99 Pac. 878; *City of Spokane v. Camp* (1908) 50 Wash. 554, 97 Pac. 770; *United States v. Oregon R. & N. Co.* (1908) 163 Fed. 640. On the other hand, in *Owensboro & N. R. Co. v. Todd* (1891) 91 Ky. 175, 15 S. W. 56, 11 L. R. A. 285, the court, without giving satisfactory reasons, declared that

company with the proviso that the repeal shall not go into effect if the company shall by a named date make up a deficiency in its assets;⁹⁴ and, though it is questionable whether this is really contingent legislation, a legislature may doubtless empower individuals to do certain acts without compelling them to do so, as in the statutes authorizing the formation of corporations.

Yet obviously it does not follow that because contingent legislation may be constitutional therefore a statute must be valid if its operation is uncertain. In the cases which we have already considered the policy of the state was determined only by the legislature; but it would be far otherwise if the contingency consisted of the will of another organ of government. It is true that in a number of cases the courts have sustained statutes which in reality delegated legislative power to the voters or the authorities of localities, upon the ground that in each case the operation of the statute was contingent.⁹⁵ And yet, without criti-

legislative power was delegated by an act which provided that, where land for the right of way had been given to a railroad company, the owners of adjoining lands might thereafter require the company to fence the right of way at its own expense; and in *Loughbridge v. Harris* (1871) 42 Ga. 500, is an unmistakably incorrect declaration that a mill dam act delegated legislative power. See also note 44, *supra*.—As a legislature does not necessarily allow an individual to shape the policy of the government whenever it makes the operation of a statute contingent upon his action or decision, it seems that it may at times make the operation of a statute to depend upon his decision whether or not he will contribute from his own possessions or whether he will waive or claim rights against other individuals or against the state, even though it may not grant to any one a right to interfere with the property or conduct of others save for the obtaining of rights which are granted to, or already belonged to, himself.—The court in *In re New York E. R. Co.* (1877) 70 N. Y. 327, 343, 344, gave an unsound reason for saying that the commission must be allowed to determine for the incorporators a number of questions concerning the organization of the company.

⁹⁴ *Lothrop v. Stedman* (1875) 42 Conn. (Supp.) 583, Fed. Cas. No. 8519.

⁹⁵ See e. g., *Rankin County v. Davis* (1912) 102 Miss., 59 So. 811, 813; *Mayor v. State* (1912) 102 Miss., 59 So. 873; *State v. Sammons* (1911) 62 Fla. 303, 314, 57 So. 196, 200; *People v. McBride* (1908)

cising the actual decisions, we must note that not only does the reason given in support of them appear to be insufficient when considered by itself,⁹⁶ but its unsoundness is further shown by the fact that if the statutes were sustainable only upon that reason the decision would be

234 Ill. 146, 177, 84 N. E. 865, 872; *Picton v. Cass County* (1904) 13 N. D. 242, 100 N. W. 711; *Ansley v. Ainsworth* (1902) 4 Ind. Terr. 308, 69 S. W. 884; *State v. Cooley* (1896) 65 Minn. 406, 68 N. W. 66; *Lum v. Mayor* (1895) 72 Miss. 950, 18 So. 476; *State v. Pond* (1887) 93 Mo. 606, 6 S. W. 469; *People v. Hoffman* (1886) 116 Ill. 587, 5 N. E. 596; *Schulherr v. Bordeaux* (1886) 64 Miss. 59, 8 So. 201; *Clarke v. Rogers* (1883) 81 Ky. 43; *People v. City of Butte* (1881) 4 Mont. 174, 1 Pac. 414; *Guild v. City of Chicago* (1876) 82 Ill. 472; *Fell v. State* (1875) 42 Md. 71; *Locke's Appeal* (1873) 72 Pa. 491; *Alcorn v. Hamer* (1860) 38 Miss. 652 (in which case the briefs were elaborate); *Bull v. Read* (1855) 13 Gratt. (Va.) 78; *Cincinnati, W. & Z. R. Co. v. Comrs.* (1852) 1 Ohio St. 77; and also *State v. Ure* (1912) 91 Neb. 31, 135 N. W. 224; *Ex parte Beck* (1912) 162 Cal. 701, 708, 124 Pac. 543, 546; *State ex rel. Hunt v. Tausick* (1911) 64 Wash. 69, 116 Pac. 651, 35 L. R. A. N. S. 802; *Orrick v. City of Ft. Worth* (1908) 52 Tex. Civ. App. 308, 114 S. W. 677; *State v. Fountain* (1908) 6 Pennewill (Del.) 520, 539, 69 Atl. 926, 934; *Thalheimer v. Board of Suprs.* (1908) 11 Ariz. 430, 94 Pac. 1129; *Ward v. State* (1908) 154 Ala. 227, 45 So. 655; *State v. Kline* (1907) 50 Ore. 426, 93 Pac. 237; *Fouts v. Hood River* (1906) 46 Ore. 492, 81 Pac. 370, 1 L. R. A. N. S. 483; *In re New Y. E. R. Co.* (1877) 70 N. Y. 327; *State v. O'Neill* (1869) 24 Wis. 149; *State v. Hunter* (1888) 38 Kan. 578, 17 Pac. 177 (in which case the appointment of commissioners and the exercise of powers by them were acts administrative in their nature for the improvement, where necessary, of the execution of a law the execution of which had been already ordered); *Cooley, Constitutional Limitations*, 7th ed., 167; *Sutherland, Statutory Construction*, 2d ed., p. 170; *Oberholtzer, The Referendum in America*, 328. In some of the earlier decisions, while the courts hold that the statutes are constitutional, they apparently consider that a statute may be so worded that after a vote is taken the constitutionality of a condition subsequent will be unimportant: that in case of a vote to enforce the law the condition may be ignored: see *State v. Parker* (1857) 26 Vt. 357, 363; *Alcorn v. Hamer* (1860) 38 Miss. 662; although in case of a contrary vote, whether the condition were constitutional or not, the statute could not be enforced. Compare *Rankin County v. Davis* (1912) 102 Miss., 59 So. 811.

⁹⁶ The distinction between valid and invalid contingent legislation is further brought out in *People v. Fire Assn. of Phila.* (1883) 92 N. Y. 311, 322, 323; *Barto v. Himrod* (1853) 8 N. Y. 483, 490, 495; *Ex parte Wall* (1874) 48 Cal. 279, 315; *Central of Ga. Ry. Co. v. Railroad Comn.* (1908) 161 Fed. 925, 936.

flatly inconsistent with the decisions that the legislature may not submit to the voters of the entire state the question whether or not a law shall become operative.⁹⁷ On the other hand, no question of the consistency of the two lines of decision could arise if the former had been based upon the ground that the legislature may grant some self-government to the localities.⁹⁸

Nor may any right of the legislature to submit the questions *whether or when* a statute shall be executed⁹⁹ be based upon its undoubted right to allow administrative bodies to decide some questions concerning the execution of statutes which do not involve the desirability of governmental action.¹⁰⁰

As just stated, the weight of authority is decidedly against the constitutionality of a submission to the vot-

⁹⁷ See note 101, *infra*.

⁹⁸ See page 50, *supra*.

⁹⁹ On the point that it was not the statute but the operation of the statute which was contingent, see *Cincinnati, W. & Z. R. Co. v. Comrs.* (1852) 1 Ohio St. 77; *Locke's Appeal* (1873) 72 Pa. 491; *United States v. Richards* (1910) 35 D. C. App. 540; *Picton v. Cass County* (1904) 13 N. D. 242, 100 N. W. 711; *Clarke v. Rogers* (1883) 81 Ky. 43; *People v. City of Butte* (1881) 4 Mont. 174, 1 Pac. 414; *People v. Reynolds* (1848) 5 Gill (Ill.) 1; *State v. Kline* (1907) 50 Ore. 426, 93 Pac. 237; *State v. Montgomery* (1912) 176 Ala., 59 So. 294, 298; compare 59 So. 299. In the Ohio case the court said, p. 88, "The law is, therefore, perfect, final, and decisive in all its parts, and the discretion given only relates to its execution. It may be employed or not employed; if employed, it rules throughout; if not employed, it still remains the law, ready to be applied whenever the preliminary condition is performed. The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." Observe the phraseology. But while the legislature unquestionably may grant the power to use some discretion when executing a statute, yet, except where legislative power may be delegated, *valid objection certainly can be made to a grant of discretion as to whether or not a statute shall be executed.*

¹⁰⁰ See note 25, *supra*.

ers of the entire state of the question whether or not a law shall become operative;¹⁰¹ and yet a concession of the validity of such legislation would not involve a concession of the validity of legislation which should grant a similar veto power to an administrative organ. And even if the legislature after framing an otherwise complete statute might allow an administrative organ to decide whether or not that statute should be enforced, it would not necessarily follow that the legislature might allow such an organ to decide upon the terms of a statute, although unless that power were grantable the legislature might not bestow upon an administrative organ any power over railroad rates further than to apply regulations made by the legislature.

Contingent legislation as to rates.

45. In view of the cases as to the contingent treatment of foreign corporations and the case sustaining a statute by which the pay of an officer of the state militia in active service was made the same as the pay of an officer of corresponding grade in the United States army,¹⁰² it seems that a state might make the local railroad rates to depend upon the rates which the federal government might establish for interstate transportation, and, conversely, the federal government might make the interstate rates to depend upon the rates which the states might establish for local transportation.¹⁰³ This would

¹⁰¹ See Oberholtzer, *The Referendum in America*, 208-217; Cooley, *Constitutional Limitations*, 7th ed., 168 et seq.; 6 A. & E. Enc. of L., 2d ed., 1022. Compare *Kadderly v. City of Portland* (1903) 44 Ore. 118, 74 Pac. 710.

¹⁰² See notes 89, 90, *supra*.

¹⁰³ This does not mean that a state legislature might in all cases make local rates depend upon the interstate rates established by the carriers, or, conversely, that Congress might in all cases make interstate rates de-

certainly be true if we could be sure that after such a law was passed the basic rates would in every instance be established simply with a view to their effect upon the transportation subject to the sovereignty establishing them and without regard to their effect upon rates not subject to that sovereignty. And it is questionable whether, when considering an alleged delegation of power, a court might inquire into the motive underlying the establishment of the basic rates.

It may be conceded that the federal statute which provides that in cases where they apply the laws of the several states shall be regarded by the federal courts as rules of decision in trials at common law¹⁰⁴ is hardly in point, for so far as substantive law is concerned Congress could not constitutionally have provided otherwise.¹⁰⁵ And hardly analogous is the federal statute which provides that in places which have been ceded by a state to the United States the punishment of offenses not specially provided for by any law of the United States shall be the same as that which at the time of the enactment of the federal statute was provided for by the law of the state which ceded the place where the offense was committed,¹⁰⁶ or the federal statute which provides that in common law causes the circuit and district courts shall en-

pend upon local rates established by the carriers. The commerce clause would at times affect such legislation. The question is discussed in note 47 in Chapter 1, *supra*.

¹⁰⁴ Rev. Stats. sec. 721; 4 Fed. Stats. An. 517; Rose, Code of Federal Procedure, sec. 12.

¹⁰⁵ See Patterson, *The United States and the States Under the Constitution*, 2d ed., sec. 109; Rose, Code of Federal Procedure, secs. 10, notes a, r, 799, note c. And those laws must also be so regarded in trials in chancery.

¹⁰⁶ Rev. Stats. sec. 5391; Act July 7, 1898, c. 576, 30 U. S. Stats. at L. 717. See *Franklin v. United States* (1910) 216 U. S. 559, 30 Sup. Ct. 434, 54 L. ed. 615.

force such remedies upon judgments as were at the time the statute was enacted provided by the laws of the states within which those courts are held and such remedies upon judgments as were or may be subsequently provided by state laws and adopted by general rules of those courts.¹⁰⁷ Nor is that statute analogous which provides that in civil causes other than equity and admiralty causes those courts shall follow as nearly as may be the procedure in the courts of record of the states within which such circuit and district courts are held, any rule of court to the contrary notwithstanding.¹⁰⁸ The latter statute, which, if it were interpreted in accordance with its probable meaning, would allow the state authorities incidentally to change the procedure in federal courts,¹⁰⁹ might possibly be sustained upon the ground upon which were sustained the less sweeping earlier statutes which merely adopted the procedure then followed by state courts and authorized the federal courts to alter and add

¹⁰⁷ Rev. Stats., sec. 916; 4 Fed. Stats. An. 580; Rose, Code of Federal Procedure, sec. 925; *Fink v. O'Neil* (1882) 106 U. S. 272, 1 Sup. Ct. 325, 27 L. ed. 196; *Ex parte Boyd* (1882) 105 U. S. 647, 651, 26 L. ed. 1200; *Ross v. Duval* (1839) 13 Pet. 45, 10 L. ed. 51; *Wayman v. Southard* (1825) 10 Wheat. 1, 6 L. ed. 253; *Bank of the United States v. Halstead* (1825) 10 Wheat. 51, 6 L. ed. 264. In spite of the decisions and the language of Marshall, C. J., in *Wayman v. Southard*, 10 Wheat. at 49, 50, 6 L. ed. at 264, it does not seem clear that, in a case in which the jurisdiction is based upon the diverse citizenship of the parties, a federal court may constitutionally ignore a then-existing state law, for example, as to stays of execution or exemptions from execution, if the state is not seeking to thwart the federal remedy by allowing a special stay or exemption to such defendant or defendants. See also Rev. Stats., sec. 915; 4 Fed. Stats. An. 577; Rose, Code of Federal Procedure, sec. 905.

¹⁰⁸ Rev. Stats., sec. 914; 4 Fed. Stats. An. 563; Rose, Code of Federal Procedure, sec. 900.—Consider also 2 Am. Pol. Sci. Rev. 364.

¹⁰⁹ Not, however, of course, where the federal courts would thereby be required to act contrary to the Federal Constitution or a federal statute: see *Slocum v. New Y. L. I. Co.* (1913) 228 U. S. 364, 33 Sup. Ct. 523, 57 L. ed. 879; Rose, Code of Federal Procedure, sec. 900, note f.

to such rules:¹¹⁰ the Supreme Court said that the providing of such rules was not an act exclusively legislative in character and might be entrusted to the courts concerned.¹¹¹ The statute under consideration, however, has been so interpreted by the Supreme Court as to make it unnecessary for federal courts to follow the procedure in the courts of record of the states within which the federal courts are held.¹¹²

But while the determination of the principles upon which rates shall be regulated is exclusively legislative in its character, and might not be entrusted by the state legislatures to Congress or by Congress to the state legislatures, it seems that a legislative body would not be delegating its power if it provided that rates which were subject to it should be affected as the merely incidental result of regulation by the legislature of another sovereignty of rates which were subject to regulation by that other body.

Grants of discretion.

46. The courts have also at times sustained legislation which granted discretion to administrative organs. Where

¹¹⁰ Rose, Code of Federal Procedure, sec. 900, notes a, aa.

¹¹¹ Of course, it does not necessarily follow that, because the legislature may entrust a power to the organ concerned, the legislature may entrust that power to a third authority. Still, so far at least as regards cases in which federal courts acquire jurisdiction by reason of the diverse citizenship of the parties, the statutes under consideration obviously carry out the purpose for which jurisdiction was granted to the federal courts far better than would any statutes which established uniform rules of procedure and uniform remedies upon judgments throughout the entire country.

¹¹² See *Boston & M. R. v. Gokey* (1908) 210 U. S. 155, 28 Sup. Ct. 657, 52 L. ed. 1002; case there cited; Rose, Code of Federal Procedure, sec. 805, beginning of note b, sec. 900, note g; *Hills & Co. v. Hoover* (1911) 220 U. S. 329, 31 Sup. Ct. 402, 55 L. ed. 485. Rev. Stats., sec. 914, was taken from a statute enacted much later than that from which Rev. Stats., sec. 918,

the discretion granted was not great ¹¹³ the decisions are probably correct, for the legislature cannot be expected to determine every unimportant question which may arise. But other decisions which sustain larger grants of discretion ¹¹⁴ can be supported only on the assumption

was taken, and the courts, in interpreting the Revised Statutes, ought to give weight to that fact. See note at 4 Fed. Stats. An. 585 on the operation of sec. 914.

¹¹³ See, e. g., *State v. McCarty* (1912) 5 Ala. Ap. 212, 226, 228, 59 So. 543, 547, 548; *Blue v. Smith* (1911) 69 W. Va. 761, 72 S. E. 1038; *Lee v. Marsh* (1911) 230 Pa. 351, 79 Atl. 564; *State v. Wagener* (1899) 77 Minn. 483, 80 N. W. 633, 46 L. R. A. 442; *In re Kollock* (1897) 165 U. S. 526, 17 Sup. Ct. 444, 41 L. ed. 813; language used in *Wayman v. Southard* (1825) 10 Wheat. 1, 43, 6 L. ed. 253, 262, 263, quoted in note 80, *supra*; 10 Wheat. 45, 46, 6 L. ed. 263; *Jermyn v. Fowler* (1898) 186 Pa. 595, 40 Atl. 972, where one of the two inconsistent positions taken by the court was that the board might be granted a discretion as to matters of detail; and also *Interstate Com. Comn. v. Goodrich T. Co.* (1912) 224 U. S. 194, 32 Sup. Ct. 436, 56 L. ed. 729; *Scott v. Marley* (1911) 124 Tenn. 388, 137 S. W. 492; *State v. Frear* (1911) 146 Wis. 291, 131 N. W. 832, 34 L. R. A. N. S. 480; *Merchants Exchange v. Knott* (1908) 212 Mo. 616, 111 S. W. 565; *St. Louis, I. M. & S. Ry. Co. v. Neal* (1906) 83 Ark. 591, 98 S. W. 958, 961 (affirmed on this point in *St. Louis, I. M. & S. Ry. Co. v. Taylor* (1908) 210 U. S. 281, 287, 26 Sup. Ct. 616, 617, 52 L. ed. 1061); *State v. Bryan* (1905) 50 Fla. 293, 369, 370, 39 So. 929, 953; *Woodruff v. New Y. & N. E. R. Co.* (1890) 59 Conn. 63, 84, 20 Atl. 17, 19; *Gregory v. Kansas City* (1912) 244 Mo. 523, 149 S. W. 466; *In re Opinion of Justices* (1907) 74 N. H. 606, 68 Atl. 873; *Morton v. Pusey* (1908) 237 Ill. 26, 86 N. E. 601. Possibly *United States v. Grimaud* (1911) 216 U. S. 614, 30 Sup. Ct. 576, 54 L. ed. 639; *Light v. United States* (1911) 220 U. S. 523, 31 Sup. Ct. 485, 55 L. ed. 570; *Colorado & S. Ry. Co. v. State R. Comn.* (1913) 54 Colo. 64, 129 Pac. 506; *Clendaniel v. Conrad* (1912) 25 Del., 83 Atl. 1036, 1051; *State v. Corvallis & E. R. Co.* (1911) 59 Ore. 450, 117 Pac. 980; *Blais v. Franklin* (1910) 31 R. I. 95, 77 Atl. 172; *People v. Dunn* (1889) 80 Cal. 211, 22 Pac. 140; *Donnelly v. United States* (1913) 228 U. S. 243, 256, 33 Sup. Ct. 449, 452, 57 L. ed. 820, come under this head. It seems that *State v. Sherow* (1912) 87 Kan. 235, 123 Pac. 866, should be supported rather upon the ground that the power granted was one of local self-government. With the cases in this note compare *Fite v. State* (1905) 114 Tenn. 646, 658, 659, 88 S. W. 941, 944, 1 L. R. A. N. S. 520, 525; *Central of Ga. Ry. Co. v. Railroad Comn.* (1908) 161 Fed. 925, 985; other cases cited in note 29, *supra*; and *State v. Burdge* (1897) 95 Wis. 390, 70 N. W. 347, 37 L. R. A. 157; *State v. Holland* (1908) 37 Mont. 393, 96 Pac. 719.

¹¹⁴ *Brady v. Mattern* (1904) 125 Iowa, 158, 100 N. W. 358. (The court

that the legislature may delegate legislative power upon important subjects which it may specify; and in still other cases (among them the oft-cited Ohio case in which the court sustained a statute allowing the people of the respective counties to decide whether or not county bonds should be issued in aid of railroad construction)¹¹⁵ while

overlooks the insurance commissioner cases, cited in note 29, *supra*, and it cites *Ryan v. Outagamie County* (1891) 80 Wis. 336, 50 N. W. 340, although the reason given for the Wisconsin decision is flatly in conflict with that on which the Iowa decision is based. The opinion in the Iowa railroad commission case, which is one of the two commission cases cited, does not mention the question of delegation of legislative power.) *State v. Preferred T. M. Co.* (1904) 184 Mo. 160, 82 S. W. 1075. (The court says that in an earlier Missouri case an act requiring a uniform policy of insurance, to be approved by the Superintendent of Insurance, was held to be constitutional, although in that case the court did not hold that the act was constitutional; it cites an insurance company case which has nothing to do with the question; and it cites a case upholding the validity of an ordinance which provided for the licensing of engineers.) The decisions in *Louisville & N. R. Co. v. Interstate Com. Comn.* (1910) 184 Fed. 118, 122; *Kingman et al., Petitioners* (1891) 153 Mass. 566, 27 N. E. 778, 12 L. R. A. 417 (compare *State v. Hudson Co. Ave. Comrs.* (1874) 37 N. J. L. 12, 19; the Massachusetts case was followed in later cases in the same state, cited in L. R. A. Cases as Authorities); *Martin v. Witherspoon* (1882) 135 Mass. 175 (no authorities cited; compare *Board of Harbor Comrs. v. Excelsior R. Co.* (1891) 88 Cal. 491, 26 Pac. 375); *Ingram v. State* (1864) 39 Ala. 247 (no authorities cited); *In re Senate Bill* (1889) 12 Colo. 188, 21 Pac. 481 (where, however, it does not appear that the general question of delegation of legislative power was considered), are also unsound. The constitutionality of the acts considered in *Zuber v. Southern Ry. Co.* (1911) 9 Ga. App. 539, 71 S. E. 937; *Arnett v. State* (1907) 168 Ind. 180, 80 N. E. 153, 8 L. R. A. N. S. 1192; *State v. Missouri P. Ry. Co.* (1907) 76 Kan. 467, 92 Pac. 606; *State v. Barringer* (1892) 110 N. C. 525, 14 S. E. 781; *People v. Dunn* (1889) 80 Cal. 211, 22 Pac. 140, is not clear. See also *State v. Great N. Ry. Co.* (1912) 68 Wash. 257, 123 Pac. 8; *Schaake v. Dolley* (1911) 85 Kan. 598, 118 Pac. 80; *City of Centralia v. Smith* (1903) 103 Mo. App. 438, 77 S. W. 488. Compare *In re County Comrs.* (1908) 22 Okla. 435, 98 Pac. 557; *Central of Ga. Ry. Co. v. Railroad Comn.* (1908) 161 Fed. 925, 985, in the latter of which the court declared unconstitutional a state law in which an attempt was made to confer upon a commission a large amount of discretion as to rates.

¹¹⁵ See note 99, *supra*. The decision in *Picton v. Cass County* (1904) 13 N. D. 242, 100 N. W. 711, is sound, but the reason given for it is not, unless the fact that the resources of the state were involved constitutes an excep-

the decisions are doubtless sound the reasoning upon which those decisions are based can be supported only upon the same assumption.

If, where an administrative organ received large grants of discretion, it adopted principles sufficient to afford it complete guidance and announced those principles as publicly and as formally as laws are announced, it would be clear to most persons that that organ was exercising power which is strictly legislative. And where the reasons for administrative decisions are not announced in

tional circumstance. The same reason had been improperly given in a number of cases cited in that opinion. In *State v. Hagood* (1888) 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841, where a statute provided that licenses to mine within the public domain might be granted or refused by the Board of Agriculture according to its judgment as to the best interests of the state, the court refused the petition of a mining company for a mandamus compelling the board to grant a license; and in *United States v. Williams* (1887) 6 Mont. 379, 12 Pac. 851, where an act of Congress provided that timber growing on the public lands might be cut subject to such regulations as the Secretary of the Interior might prescribe for the protection of the undergrowth "and for other purposes," the court sustained an action for the value of timber cut in violation of law. In each case the court said that legislative power was not delegated to administrative officers. It seems that that reason was unsound, and that the courts should, instead, have said merely that the absence of valid statutes did not warrant the appropriation of public property by individuals. See also *United States v. Grimaud* (1911) 220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563 (1910) 216 U. S. 614, 30 Sup. Ct. 576, 55 L. ed. 639; *Light v. United States* (1911) 220 U. S. 523, 31 Sup. Ct. 485, 55 L. ed. 570; *Payne & Butler v. Providence G. Co.* (1910) 31 R. I. 295, 77 Atl. 145.—In several cases, e. g., *People v. Grand T. W. Ry. Co.* (1908) 232 Ill. 292, 298, 83 N. E. 839, 842; *Chicago, B. & Q. R. Co. v. Jones* (1894) 149 Ill. 361, 378, 37 N. E. 247, 251, 24 L. R. A. 141, 145; and see cases there cited and *United States v. Grimaud* (1911) 220 U. S. 506, 517, 31 Sup. Ct. 480, 483, 55 L. ed. 563; *Wayman v. Southard* (1825) 10 Wheat. 1, 43, 6 L. ed. 253; the courts have said that a legislature "may authorize others to do those things which it might properly, yet cannot understandingly or advantageously, do itself." Undoubtedly a legislature may delegate to others *some* powers which it might rightfully exercise itself. But the statement, which is worthless as a test of constitutionality, cannot properly mean that where a legislature cannot advantageously enact specific regulations it may empower others to make such regulations without the guidance of legislatively-established principles.

advance or where that organ does not decide in advance upon any guiding principles whatever its determinations are fully as legislative in their nature.¹¹⁶ The fact that no act legislative in character preceded its determinations in specific cases cannot make those determinations valid. The legislature alone has power to change the requirements of the government as to the conduct of individuals; and while the legislature, though it may state its requirements in specific form, need not do so, but may entrust that power to an administrative organ if the legislature itself ordains the principles from which those specific rules may be deduced, an administrative organ would exercise legislative power if it enforced rules which were not based upon principles established by the legislature or if it interfered with the conduct of individuals without the previous establishment of any rule whatever.

Possible differences in extent and character of regulation.

47. Of course, if there were only one degree and character of rate regulation which a legislature might constitutionally ordain, it would be sufficient for the legislature simply to create a commission and empower it to name specific rates. Further directions would be unnecessary. But it is obvious that there are constitutionally possible

¹¹⁶ Where no uniform rules are adopted the danger of injustice is, of course, far greater than when they are adopted. The administrative organ may act not merely at haphazard but with partiality, and the opportunity to work injustice through partiality gives to persons who may be unscrupulous a means of keeping themselves in misused power. The danger is a real one. It would be far easier for that organ to act with dishonest motives than it would be to prove such motives so clearly as to warrant a court in restraining the action upon that ground. And if the opportunity to work such injustice might constitutionally be given to an administrative organ, no assumption by the judiciary of an unrestrained veto-power—which is not granted to the judiciary by the constitutions—would be sufficient to prevent such an evil.

regulations of rates which differ in extent and character. The legislature may seek merely to prevent manifestly extortionate or manifestly discriminatory charges; or it may, within broad constitutional limits, go further and, disregarding the question whether the rates and the relations between rates which have been fixed by the carriers are manifestly improper in themselves, it may command that the rates and the relations between rates be made to conform to principles of public policy laid down by the legislature.¹¹⁷ And, of course, in deciding upon the policy

¹¹⁷ As Mr. Victor Morawetz said before the Senate Committee on Interstate Commerce on April 18, 1905, "The expressions 'reasonable rates' and 'unreasonable rates' are often used in very different senses. Thus, when it is said that a rate shall be reasonable, this may mean (1) that the rate shall not be unreasonably high and illegal under the common law and the interstate commerce act, or (2) that the rate shall not be unreasonably low in the sense of being confiscatory, or (3) that the rate shall be the particular rate which, in the opinion of a commission or of some particular person, ought to be established between these two extremes." "There is a wide range between a rate that is unreasonably high, and therefore illegal as against the shipper, and a rate that is so low as to be confiscatory as against the carrier. For example: assuming that a railway company may charge 40 cents a hundred pounds for carrying a given article between two points without making the rate unreasonably high and therefore illegal, it is quite possible that this rate might be reduced by legislative action to, say, 30 cents a hundred pounds without violating any constitutional right of the carrier. In this case the maximum rate which would be reasonable and which could be imposed by the carrier upon the shipper would be 40 cents a hundred pounds, and the minimum rate which could be imposed by the legislature on the railway company would be 30 cents a hundred pounds." See also Morawetz, *The Power of Congress to Regulate Railway Rates*, 18 Harv. L. Rev. 572, 579. As the legislature may prohibit rates which are extortionate and may prescribe rates which are not confiscatory, there is no reason whatever to doubt that the legislature may itself fix rates anywhere between those extremes, and that it may authorize a commission to fix rates at any point between those extremes if the legislature declares what that point shall be.—The opinion in *Trustees v. Saratoga G., E. L. & P. Co.* (1908) 191 N. Y. 123, 146, 147, 83 N. E. 693, 700, 18 L. R. A. N. S. 713, does not call for serious consideration. At that point the court apparently overlooked the fact that a legislature may itself name specific rates, and it is not clear that the court realized that the word "reasonable" is used in more than one sense. And in *Interstate C. S. Ry. Co. v. Common-*

to be followed and in settling the claims of conflicting interests, there are abundant opportunities for differences of opinion and there are at least several possible solutions of the questions at issue. For the problems involved in rate regulation are complicated and important. A legislature, in deciding upon principles of regulation, may affect economic conditions within the territory subject to it at least as greatly as they could be affected by any possible changes in the federal tariff.¹¹⁸ Since, therefore, there is a wide range of possible differences in the extent and character of regulations, it necessarily follows that, un-

wealth (1907) 207 U. S. 79, 86, 28 Sup. Ct. 26, 27, 52 L. ed. 111, Holmes, J., apparently did not give sufficient consideration to the use of the word "reasonable." On that point he spoke only for himself.

¹¹⁸ For example, a change in the relation between the rates charged on carload lots and those charged on less than carload lots may cause the building up of a jobbing business or may cause the following of different methods of distribution; a change in the relation between raw and manufactured products, as between grain and flour or live stock and dressed meat, may cause a shifting in the location of a manufacturing industry; a change in the relation between products which can at times be substituted for each other, as between the various kinds of building materials or the various kinds of food stuffs, may seriously affect the producers; and a change in the relation between different termini may cause the decay of one community and the upbuilding of another. A change of rate upon one road may be important mainly because of the change in relation to rates charged by another road which carries products from a competing source of supplies or to a competing market in a different part of the country. Of course, where the rates imposed by the government are merely maximum and not absolute the carrier may be able to allow the relation between the rates actually charged to remain the same. But any change in the relation between rates does affect economic conditions and may affect them seriously.—And even when no question of the relation between rates is involved, a change in rates may have a serious effect upon the producers as well as upon the railroad and upon the consumers. Passing over the more obvious illustrations—a reduction in the rates chargeable may make it necessary for the carrier to reduce its operating expenses, delaying transportation in each case until there accumulates an amount of freight nearer to the maximum hauling capacity of its engines, in that way giving to the large producer or the producer at a large shipping centre an advantage over a competitor who produces less or who is less favorably situated.

less legislative power may be delegated, when the legislature entrusts to a commission the power of naming specific rates it must state definitely what principles are to be made effective by that commission.

Do the statutes establish definite principles?

48. Some of the courts which have sustained statutes authorizing commissions to name railroad rates have thought, more or less clearly, that in those statutes the legislatures had declared what the law should be and had left to the commissions merely the enforcement of legislation. We have gathered together the cases in which the courts took that position and have shown the provisions of the statutes there involved.¹¹⁹ But none of those courts realized that important differences in rate regulation are constitutionally possible.¹²⁰ Consequently, of course, none of those courts sufficiently considered the question whether in the statute before it the legislature had actually established definite principles for the guidance of the commission in naming specific rates. And for that reason it cannot be said that that question has been finally settled as to any of those statutory provisions.¹²¹

It is possible, in view of the context in some of the statutes, that the term "reasonable rates" is used to denote rates which mark the border beyond which charges by the

¹¹⁹ See note 37, *supra*.

¹²⁰ See, however, *Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Comn.* (1908) 136 Wis. 146, 163, 164, 116 N. W. 905, 911, 17 L. R. A. N. S. 821, 830.

¹²¹ See, however, case cited in note 30, *supra*, where a railroad commission statute was declared unconstitutional upon the ground that it sought to delegate legislative power. On the other hand, see *Louisville & N. R. Co. v. Interstate Com. Comn.* (1910) 184 Fed. 118, where "reasonable" is used in two senses, and where the court takes very loose views (p. 122) as to the necessity for the legislative establishment of guiding principles.

carrier would be extortionate, and while there may be some doubt as to just what would constitute an extortionate charge, it seems that a grant of power to name such rates would not be so indefinite as to be unconstitutional. But the statutes do not appear to use the word "reasonable" in any other sense which is so definite that, if interpreted in that way, a grant of power to name "reasonable rates" would be constitutional. It is true that some courts have, by way of false analogy, applied the term "reasonable" to rates which were not so low as to be confiscatory; yet we cannot say that the statutes in empowering the naming of "reasonable rates" intended to direct that the rates should be made as low as would be constitutional. And no one who is acquainted with railroad transportation would assert that, on principle, between the extremes of extortion and confiscation there can be only one rate which is justifiable.¹²²

While, however, a grant of the power to name "reasonable rates" is constitutional if that term is used by the legislature to enunciate a definite principle in accordance with which the commission must act, yet when that term is inextricably bound up with other terms which are indefinite the entire clause seems to be unconstitutional. This is true in the case of the Interstate Commerce Act. And we have there not only the language of the statute itself but also the interpretation which the commission has placed upon such language to show that Congress has attempted to confer upon the commission a discretion which is so broad that the provision cannot be upheld

¹²² As Mr. Victor Morawetz said before the Senate Committee on Interstate Commerce on April 18, 1905, "It is rarely, if ever, true that there is but one just and reasonable rate for the transportation of a given article between two points. In nearly every instance there is a wide range within which any rate would be just and reasonable." See also note 117, supra.

upon any ground which is not flatly inconsistent with the rule that legislative power may not be delegated.

We have, for instance, the statement of the commission itself that "every case before the commission, however trivial it may appear, involves in its disposition the formulation of principles under the law which have important bearing upon the business of carriers and the commerce, not only of the immediate locality, but often of the entire country."¹²³ And while Congress may not have

¹²³ Sixth Annual Report (1892) p. 12. This statement was repeated in its Seventh Annual Report (1893) p. 13, the commission also saying that "what may sometimes appear to be unnecessary delay in the disposition of matters before the commission is really the taking of time to consider the effect of a ruling upon the whole situation and beyond that which might be just as between only the parties to the record." And in its Ninth Annual Report (1895) p. 59, the commission said, "To some extent the principles upon which taxation rests must be allowed in fixing a just rate; to some extent the result of the rate upon the development of industries must be taken into the account in all decisions which the commission is called upon to make; to some extent every question of transportation involves moral and social considerations, so that a just rate cannot be determined independently of the theory of social progress." See also Fourth Annual Report (1890) p. 6; *Texas & P. Ry. Co. v. Interstate Com. Comm.* (1896) 162 U. S. 197, 234, 16 Sup. Ct. 666, 681, 40 L. ed. 940. Commissioner Prouty said in the *American Monthly Review of Reviews* for May, 1906, p. 595, "Now the fixing of a railway rate is in its nature legislative rather than judicial. There is no standard by which it can be determined. . . . In determining the justice or reasonableness of a particular rate all these factors, and many others, may present themselves for consideration. They are properly taken into account by the traffic official who fixes the rate in the first instance, and they must be considered by the administrative body which revises that rate. It is finally a question of judgment what, taking everything into account, ought fairly to be done." In the same article he declared, p. 596, "It exercises precisely the same administrative function in correcting as does the traffic official in establishing" rates, with the qualification that the commission considers more than the interests of the carrier. In connection with that declaration should be read his statement in the same magazine for July, 1906, p. 65, "The making of a railway rate rests in the judgment of the traffic official. Within very wide limits that official could not demonstrate by any legal standard and legal evidence that his rate was right; neither could the shipper demonstrate by the same methods that it was wrong." Compare the end of section 40, *supra*.

realized the indefiniteness of its grant of power, it is true that a consistent application of the law involves the formulation of important principles which may affect fourteen billion dollars' worth of railroad property; which may affect one and a half million workmen and their families who are directly dependent upon railroad earnings; and which may affect seriously every industry and every section of the country.¹²⁴ And it involves the formulation of those principles by an administrative body and not by Congress.

If a legislative body may constitutionally grant such a broad discretion to a railroad commission, where must it stop? May not Congress delegate to a commission similar power over the tariff or over taxation in general? May not the state legislatures delegate to commissions similar power over the criminal laws? May not the power which is granted to seven men or five or three be granted to one man,^{124a} and not upon one subject only, but upon every subject which now comes before the legislatures?¹²⁵

¹²⁴ That the grant of power has such a scope seems clear notwithstanding *Southern P. Co. v. Interstate Com. Comn.* (1911) 219 U. S. 433, 31 Sup. Ct. 288, 55 L. ed. 283; *Interstate Com. Comn. v. Northern P. Ry. Co.* (1910) 216 U. S. 538, 30 Sup. Ct. 301, 54 L. ed. 608; *Interstate Com. Comn. v. Chicago G. W. Ry. Co.* (1908) 209 U. S. 108, 28 Sup. Ct. 493, 52 L. ed. 705. And see *Interstate Com. Comn. v. Union P. R. Co.* (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308. Compare sec. 51, *infra*.

^{124a} Indeed, the President can now control the decisions of the Interstate Commerce Commission, for its members are removable at his pleasure: see section 11 of the Act.

¹²⁵ As was said by Mr. E. B. Whitney in 31 Am. L. Reg. 186, "Many cases could be put in which the ruling party could, for a considerable time, perpetuate its power in a situation like that of the second session of the Fifty-first Congress. President, Senate and House of Representatives then belonged to the same political party, and had it in their power to make the laws. They knew that on the fourth day of March then next ensuing the opposition would obtain control of one branch of Congress, so that for two years party legislation would be impossible. If a Congress has an unlimited right of delegation, a series of acts could easily, and might

EXTENT OF POWER OF COURTS.

General principles.

49. A court decides in specific instances whether particular persons who are before it have complied with the law of the land or are complying with that law, and if they have not complied with that law or are not complying with it, the court awards against such persons decrees of compliance, reparation or punishment. Such is the extent of its duty and of its power. It cannot make the law;¹²⁶ it cannot change the law;¹²⁷ and it cannot refuse to recognize changes in the law which have been made by the appropriate authorities unless such changes violate the constitution.¹²⁸ A rule of law may be abolished and the duty to apply a new rule of law may be imposed upon the court.

in the future, perhaps, not improbably, be passed, which should secure to the President the right of legislation during those two years, while the ensuing Congress would simply and easily, by the ordinary parliamentary processes, be stifled in a deadlock. Thus the power to delegate involves the power to create a limited dictatorship."—See also discussion in *U. of Pa. L. Rev.*, Oct., 1908, p. 101.

¹²⁶ *Prentiss v. Atlantic C. L. Co.* (1908) 211 U. S. 210, 226, 29 Sup. Ct. 67, 69, 53 L. ed. 150; *United States v. Evans* (1909) 213 U. S. 297, 29 Sup. Ct. 507, 53 L. ed. 803; *Express Cases* (1886) 117 U. S. 1, 29, 6 Sup. Ct. 542, 628, 556, 29 L. ed. 791; *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* (1884) 110 U. S. 667, 686, 4 Sup. Ct. 185, 194, 28 L. ed. 291; *Road Imp. Dist. v. Glover* (1909) 89 Ark. 513, 117 S. W. 544; notes 129, 139, 141, *infra*. Compare *Kansas v. Colorado* (1907) 206 U. S. 46, 27 Sup. Ct. 655, 51 L. ed. 950 (commented on in *Trickett, The Newest Neologism of the Supreme Court*, 41 *Am. L. Rev.* 729; note in 21 *Harv. L. Rev.* 47); 6 *A. & E. Enc. of L.*, 2d ed., p. 1033; Pound, *Common Law and Legislation*, 21 *Harv. L. Rev.* 383; *Judge-made Law*, 35 *Nat. Corp. Rep.* 613; Hornblower, *A Century of "Judge-made" Law*, 7 *Col. L. Rev.* 453; Dicey, *Law and Opinion in England*, 359, 481; Pollock, *Essays in Jurisprudence and Ethics*, 237; Dicey, *The Law of the Constitution*, 7th ed., 58; Rand, *Swift v. Tyson Versus Gelpcke v. Dubuque*, 8 *Harv. L. Rev.* 328.

¹²⁷ See note 126, *supra*.

¹²⁸ See note 16, *supra*.

Distinction between judicial and legislative power over rates.

50. These principles are abundantly supported by the weight of authority, and they unquestionably apply in the case of rate regulation. Indeed, they have been applied by the Supreme Court to problems of rate regulation in language almost as definite as that which has been used in the text.¹²⁹ It is true that there are expressions in some opinions which assert the existence of more power in the courts and of less power in the legislatures and it is true that in other instances the court has failed to recognize the existence of some powers which may be entrusted to the courts. There may be found in the opinions a number of expressions which are inconsistent with the statements which have just been made; and those expressions have in several instances confused those who subsequently enacted state legislation;¹³⁰ but such expressions are not in accord with the weight of authority.

Thus, the court has asserted that the common law rule as to the validity of rates for transportation remained in force in spite of legislation and that the court had power to declare invalid rates established by the legislature or under its authority if the rates so established did not com-

¹²⁹ "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind:" *Prentis v. Atlantic C. L. Co.* (1908) 211 U. S. 210, 226, 29 Sup. Ct. 67, 69, 53 L. ed. 150. See also other cases cited in note 19, supra; and *Muskrat v. United States* (1911) 219 U. S. 346, 31 Sup. Ct. 250, 55 L. ed. 246.

¹³⁰ See, for example, the statutes considered in *State v. Johnson* (1900) 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; *Western U. T. Co. v. Myatt* (1899) 98 Fed. 335; *Prentis v. Atlantic C. L. Co.* (1908) 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150.

ply with the common law.¹³¹ In other words, in some cases the court has gone beyond an assertion of power to refuse to enforce legislation which it considers unconstitutional, and it has measured the boundaries of the judicial power by the fact that courts once enforced particular rules of substantive law. But we have already considered this position in another part of the present chapter¹³² and we have seen that the position is clearly unsound. The legislature may unquestionably make changes in the common law.

It is also true that the court has said that "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."¹³³ And yet it is clear that the court in so saying was not felicitous in expressing the distinction between judicial and legislative acts. The court should have said, as it has said in later cases,¹³⁴ that it is the distinction between applying an existing rule of law and adopting a new and possibly different rule of law for relations which may exist in the future. The decision of the question whether the law has been complied with is, of course, a judicial act.¹³⁵ On the other hand, the legislature may change the law, or it may state prospectively¹³⁶ what

¹³¹ See latter part of note 16, *supra*.

¹³² See sec. 33, *supra*.

¹³³ *Interstate Com. Comn. v. Cincinnati, N. O. & T. P. Ry. Co.* (1897) 167 U. S. 479, 499, 17 Sup. Ct. 896, 900, 42 L. ed. 243.

¹³⁴ See cases in note 19, *supra*.

¹³⁵ *Interstate Com. Comn. v. Brimson* (1894) 154 U. S. 447, 485, 14 Sup. Ct. 1125, 1136, 38 L. ed. 1047; concurring opinion in *Winchester & S. R. Co. v. Commonwealth* (1906) 106 Va. 264, 281, 55 S. E. 692, 698; *Barrett v. Indiana* (1913) 229 U. S. 26, 30, 33 Sup. Ct. 692, 693, 57 L. ed. 1050. Compare discussion in *Louisville & N. R. Co. v. Shiler* (1911) 186 Fed. 176.

¹³⁶ Yet on the validity of retroactive laws see *Johannessen v. United*

would be a sufficient compliance with the existing law, or it may authorize an administrative body to state the law prospectively if the legislature has laid down sufficient rules for the guidance of the administrative body.

But while the legislature has power to change the law and to prescribe the rates which shall be charged in the future, and while the courts have not the power to change the law, judicial acts are not always strictly retrospective, for as a general rule a court may require the observance in the future of the law as it stands at the present time.¹³⁷ This may be done in a proceeding for a mandamus or an injunction.¹³⁸

States (1912) 225 U. S. 227, 32 Sup. Ct. 613, 56 L. ed. 1066; *Kentucky U. Co. v. Commonwealth of Kentucky* (1911) 219 U. S. 140, 152, 153, 31 Sup. Ct. 171, 177, 55 L. ed. 137, and cases there cited; *Black, Constitutional Law*, 3d ed., 752 et seq.; *In re Coburn* (1913) Cal., 131 Pac. 352, 355, 356; *State Comm. in Lunacy v. Welch* (1913) Cal., 129 Pac. 974. Compare *Greenough v. Greenough* (1849) 11 Pa. St. 494; *Swigart v. Baker* (1913) 229 U. S. 187, 33 Sup. Ct. 645, 57 L. ed. 1143.

¹³⁷ In *Janvrin, Petitioner* (1899) 174 Mass. 514, 517, 47 L. R. A. 319, 321, sub nom. *Janvrin v. Revere W. Co.*, 55 N. E. 381, 382, where the court was asked to establish the rate to be charged for water, the court said, by Holmes, C. J., that the statute "does not undertake merely to make of the court a commission to determine what rule shall govern people who are not yet in relation to each other, and who may elect to enter or not to enter into relations as they may or may not like the rule which we lay down: it calls on us to fix the extent of actually existing rights. With regard to such rights judicial determinations are not confined to the past. If it legitimately might be left to this court to decide whether a bill for water furnished was reasonable, and, if not, to cut it down to a reasonable sum, it equally may be left to the court to enjoin a company from charging more than a reasonable sum in the immediate future." See also *Bitterman v. Louisville & N. R. Co.* (1907) 207 U. S. 205, 228, 229, 28 Sup. Ct. 91, 100, 52 L. ed. 171; *West Virginia N. R. Co. v. United States* (1904) 134 Fed. 198; *Tift v. Southern Ry. Co.* (1903) 123 Fed. 789 (1905) 138 Fed. 753, affirmed *Southern Ry. Co. v. Tift* (1907) 206 U. S. 428, 27 Sup. Ct. 709, 51 L. ed. 1124; *Packet Co. v. Catlettsburg* (1881) 105 U. S. 559, 565, 26 L. ed. 1169; *Montezuma C. Co. v. Smithville C. Co.* (1910) 218 U. S. 371, 31 Sup. Ct. 67, 54 L. ed. 1074; *M. C. Kiser Co. v. Central of Ga. Ry. Co.* (1907) 158 Fed. 193; *Interstate Comm. v. Chicago, B. & Q. R. Co.* (1899) 94 Fed. 272, 98 Fed. 173; *Tyrone G. & W. Co. v. Burley* (1902) 19 Pa. Super. 348, 354; *Central I. W.*

Yet, of course, a court may so act only in specific cases wherein all of the essential parties have been before it,¹³⁹ and only in cases in which the court possesses jurisdiction.¹⁴⁰ Thus it does not follow that where the Supreme Court has declared a state regulation unconstitutional the Supreme Court may go further and declare what regulations would be constitutional;¹⁴¹ the statute may prescribe a method of enforcement which withdraws some questions from the determination of the courts;¹⁴² and it

v. *Pennsylvania R. Co.* (1895) 17 Pa. Co. Ct. 651, 5 Pa. Dist. 247; *Menacho v. Ward* (1886) 27 Fed. 529; *Southern Ex. Co. v. Memphis & L. R. R. Co.* (1881) 8 Fed. 799 (of which the case last cited was overruled on another ground in *Express Cases* (1886) 117 U. S. 1, 6 Sup. Ct. 542, 29 L. ed. 791); 8 L. R. A. N. S. 529; and note 138, *infra*. Compare *Gulf C. Co. v. Harris* (1908) 158 Ala. 343, 354, 48 So. 477, 481, 24 L. R. A. N. S. 399, 403, 404; *Colorado T. Co. v. Wilmore* (1913) Colo., 129 Pac. 204; note 146, *infra*.

¹³⁸ See cases in note 137, *supra*, and also *Cen. Dig., Injunction*, sec. 141; *Cen. Dig., Mandamus*, sec. 269; *Dec. Dig., Mandamus*, sec. 134; *Dec. Dig., Carriers*, secs. 18 (6), 201; *Dec. Dig., Street Railroads*, sec. 57 (6); *Dec. Dig., Telegraphs and Telephones*, sec. 33 (1).

¹³⁹ *Brymer v. Butler Water Co.* (1897) 179 Pa. 231, 36 Atl. 249, 36 L. R. A. 260; *State v. Johnson* (1900) 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; and see *Salt R. V. C. Co. v. Nelson* (1906) 10 Ariz. 9, 85 Pac. 117, 12 L. R. A. N. S. 711; *San Diego L. & T. Co. v. Jasper* (1903) 189 U. S. 439, 440, 23 Sup. Ct. 571, 47 L. ed. 892; *Muskraat v. United States* (1911) 219 U. S. 346, 31 Sup. Ct. 250, 55 L. ed. 246; note in 8 L. R. A. N. S. 529; *Pensacola & A. R. Co. v. State* (1889) 25 Fla. 310, 5 So. 833, 3 L. R. A. 661, 37 A. & E. R. Cas. 579. Compare *Montezuma C. Co. v. Smithville C. Co.* (1910) 218 U. S. 371, 31 Sup. Ct. 67, 54 L. ed. 1074.

¹⁴⁰ See, e. g., *Missouri P. Ry. Co. v. United States* (1903) 189 U. S. 274, 23 Sup. Ct. 507, 47 L. ed. 811; *Capital C. G. Co. v. City of Des Moines* (1896) 72 Fed. 818, 822; and also *Brown on Jurisdiction*, chap. 2.

¹⁴¹ *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 400, 14 Sup. Ct. 1047, 1055, 38 L. ed. 1014. And see *Lanning v. Osborne* (1896) 76 Fed. 319, 336; *Montana, W. & S. R. Co. v. Morley* (1912) 198 Fed. 991, 1008; *Trammell v. Dinsmore* (1900) 102 Fed. 794; *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1898) 90 Fed. 363, 365; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Comn.* (1908) 136 Wis. 146, 116 N. W. 905, 17 L. R. A. N. S. 821.

¹⁴² See sec. 51, *infra*, and, by way of analogy, note 28 in Chap. 1, *supra*; and also *Morrisdale C. Co. v. Pennsylvania R. Co.* (1913) 230 U. S. 304, 33 Sup. Ct. 938, 57 L. ed. 1494; *Proctor & Gamble Co. v. United States* (1912)

is also quite conceivable that a law might be so indefinite as to be incapable of enforcement,¹⁴³ or surrender to the courts such broad power to say what the law should be as to be unconstitutional as delegating legislative power to the courts.¹⁴⁴

Judicial review of administrative orders establishing rates.

51. As we have already seen, the courts have in the absence of statute a very limited power to state in specific form the rates which may be charged for future transportation. So also it seems clear that the legislature may grant to a court the power to name such rates in cases wherein all of the essential parties are before the court. And it has been held that the legislature may provide that the decisions of a commission shall constitute merely *prima facie* evidence as to what rates will comply with the

225 U. S. 282, 32 Sup. Ct. 761, 56 L. ed. 1091; *Hooker v. Knapp* (1912) 225 U. S. 302, 32 Sup. Ct. 769, 56 L. ed. 1099; *Texas & P. Ry. Co. v. Abilene C. O. Co.* (1907) 204 U. S. 426, 27 Sup. Ct. 350, 51 L. ed. 553; *Osborne v. San Diego L. & T. Co.* (1900) 178 U. S. 22, 20 Sup. Ct. 860, 44 L. ed. 961; *Baltimore & O. R. Co. v. United States ex rel. Pitcairn C. Co.* (1910) 215 U. S. 481, 30 Sup. Ct. 164, 54 L. ed. 292; *Honolulu R. T. & L. Co. v. Hawaii* (1908) 211 U. S. 282, 29 Sup. Ct. 55, 53 L. ed. 186; *Atlantic C. L. R. Co. v. Macon G. Co.* (1909) 166 Fed. 206; *Meeker v. Lehigh V. R. Co.* (1908) 162 Fed. 354; *Erie R. Co. v. Wenaque L. Co.* (1908) 75 N. J. L. 878, 69 Atl. 168; *Nebraska T. Co. v. State* (1898) 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; *People's G. L. & C. Co. v. Hale* (1901) 94 Ill. App. 406, 424; *Brown on Jurisdiction*, chap. 2.

¹⁴³ *Louisville & N. R. Co. v. Railroad Comn. of Tennessee* (1884) 19 Fed. 679, 692, 693; *Louisville & N. R. Co. v. Commonwealth* (1896) 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209; *State v. Texas & N. O. R. Co.* (1907) Tex. Civ. App., 103 S. W. 653; *State of Louisiana v. Gaster* (1893) 45 La. Ann. 636, 12 So. 739. Compare *Nash v. United States* (1913) 229 U. S. 373, 33 Sup. Ct. 780, 57 L. ed. 1232; *Ohio v. Dollison* (1904) 194 U. S. 445, 24 Sup. Ct. 703, 48 L. ed. 1062; *Freund, Police Power*, p. 25.

¹⁴⁴ See cases cited in 8 Cyc. 835 and cumulative supplement thereto. Compare *Standard Oil Co. v. United States* (1911) 221 U. S. 1, 69, 31 Sup. Ct. 502, 519, 55 L. ed. 619.

principles laid down by the legislature and may subject those decisions to review by the courts, both on the law and the facts,¹⁴⁵ in so far as relates to the application of those decisions to parties who are then before the court.¹⁴⁶

But the legislature may go further than this. It may establish general principles, authorize a commission to state in a more specific form the law so laid down, and require the courts to enforce those more specific statements of the law, declaring that the orders of the commission shall be final unless beyond the power which it may constitutionally exercise, or beyond its statutory authority, or based upon a mistake of law.¹⁴⁷ In considering the

¹⁴⁵ See note 33, *supra*; *Proctor & Gamble Co. v. United States* (1912) 225 U. S. 282, 297, 32 Sup. Ct. 761, 767, 56 L. ed. 1091; *Interstate Com. Comn. v. Alabama M. Ry. Co.* (1897) 168 U. S. 144, 18 Sup. Ct. 45, 42 L. ed. 414; *United States v. Duell* (1899) 172 U. S. 576, 19 Sup. Ct. 286, 43 L. ed. 559; *Tift v. Southern Ry. Co.* (1905) 138 Fed. 753. Compare *Chicago, I. & L. Ry. Co. v. Railroad Comn.* (1911) 175 Ind. 630, 644, 645, 95 N. E. 364, 369.

¹⁴⁶ But as to power of court to establish schedules of rates for the general public see cases in note 139, *supra*; *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 375, 72 N. W. 713, 716; *State ex rel. Sheets v. Toledo H. T. Co.* (1905) 72 Ohio St. 60, 74 N. E. 162; *Nebraska T. Co. v. State* (1898) 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; *Southern P. Co. v. Colorado F. & I. Co.* (1900) 101 Fed. 779; *McNulty v. Brooklyn H. R. Co.* (1900) 66 N. Y. Supp. 57; *People ex rel. Central P., N. & E. R. Co. v. Willcox* (1909) 194 N. Y. 383, 87 N. E. 517; *Western U. T. Co. v. Myatt* (1899) 98 Fed. 335; 8 L. R. A. N. S. 529. Compare *Railroad Comn. v. Weld & Neville* (1903) 96 Tex. 394, 73 S. W. 529; *Railroad Comn. v. Houston & T. C. R. Co.* (1897) 90 Tex. 340, 38 S. W. 750.

¹⁴⁷ See *Interstate Com. Comn. v. Union P. R. Co.* (1912) 222 U. S. 541, 547, 32 Sup. Ct. 108, 111, 56 L. ed. 308; *Interstate Com. Comn. v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946; and also *Long I. W. S. Co. v. Brooklyn* (1897) 166 U. S. 685, 695, 17 Sup. Ct. 718, 722, 41 L. ed. 1165; *Noyes, American Railroad Rates*, 250; *Prouty, Court Review of the Orders of the Interstate Commerce Commission*, 18 Yale L. J. 297, 300; note in *Wigmore on Evidence*, V, p. 127; citations at end of note 16, *supra*; section 117, *infra*. Compare *Interstate Com. Comn. v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431; *Southern P. Co. v. Interstate Com. Comn.* (1911) 219 U. S. 433, 31 Sup. Ct. 288, 55 L. ed. 283; *Gulf, C. & S. F. Ry. Co. v. Railroad Comn.* (1909) 102 Tex. 338, 116 S. W. 795.

subject of orders of the commission for the purpose of enforcing or restraining their enforcement, the court may be confined by statutory operation to determining whether there have been violations of the constitution, a want of conformity to statutory authority, or to ascertaining whether power has been so arbitrarily exercised as virtually to transcend the authority conferred, although it may not be technically doing so.¹⁴⁸

It is true that questions of fact may be involved in the determination of questions of law, so that an order regular on its face may be set aside if it appears that the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or if the commission acted so arbitrarily and unjustly as to fix rates contrary to evidence or without evidence to support it; or if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power.¹⁴⁹ But "in determining these mixed questions of law and fact the court confines itself to the ultimate question as to whether the commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like tes-

¹⁴⁸ *Proctor & Gamble Co. v. United States* (1912) 225 U. S. 282, 297, 298, 32 Sup. Ct. 761, 767, 56 L. ed. 1091; *Interstate Com. Comm. v. Union P. R. Co.* (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308; *Interstate Com. Comm. v. Illinois C. R. Co.* (1910) 215 U. S. 452, 30 Sup. Ct. 155, 54 L. ed. 280; *Florida E. C. Ry. Co. v. United States* (1912) 200 Fed. 797, 802; *Chicago, I. & L. Ry. Co. v. Railroad Comm.* (1911) 175 Ind. 630, 644, 645, 95 N. E. 364, 369; *Kansas C. S. Ry. Co. v. United States* (1913) 204 Fed. 641, 644, 645.

¹⁴⁹ *Interstate Com. Comm. v. Union P. R. Co.* (1912) 222 U. S. 541, 547, 32 Sup. Ct. 108, 111, 56 L. ed. 308; cases there cited; *Interstate Com. Comm. v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431; *Stickney v. Interstate Com. Comm.* (1908) 164 Fed. 638. Compare *Noyes, American Railroad Rates*, 250.

timony, it would have made a similar ruling." The conclusion of the commission "is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to support the order." ¹⁵⁰

By way of caution it may be added that the question whether the order of a commission is in excess of statutory authority is a question for the federal courts only when it deals with the federal commission or when, dealing with a state commission, it arises in a federal court in a case in which the court has obtained jurisdiction on some other ground, such as the diverse citizenship of the parties. ¹⁵¹

¹⁵⁰ *Interstate Com. Comm. v. Union P. R. Co.* (1912) 222 U. S. 541, 547, 548, 32 Sup. Ct. 108, 111, 56 L. ed. 308. See also *Interstate Com. Comm. v. Delaware, L. & W. R. Co.* (1911) 220 U. S. 235, 31 Sup. Ct. 392, 55 L. ed. 448; *Southern P. Co. v. Interstate Com. Comm.* (1911) 219 U. S. 433, 31 Sup. Ct. 288, 55 L. ed. 283; *Illinois C. R. Co. v. Interstate Com. Comm.* (1907) 206 U. S. 441, 27 Sup. Ct. 700, 51 L. ed. 123; *Cincinnati, H. & D. Ry. Co. v. Interstate Com. Comm.* (1907) 206 U. S. 142, 27 Sup. Ct. 648, 51 L. ed. 995; *Zakonaite v. Wolf* (1912) 226 U. S. 272, 33 Sup. Ct. 31, 57 L. ed. 218; *People v. New York State Board* (1905) 199 U. S. 48, 52, 25 Sup. Ct. 713, 715, 50 L. ed. 79; *Bates & Guild Co. v. Payne* (1904) 194 U. S. 106, 24 Sup. Ct. 595, 48 L. ed. 894; *Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Comm.* (1908) 136 Wis. 146, 116 N. W. 905, 17 L. R. A. N. S. 821. Compare *United States v. Baltimore & O. S. W. R. Co.* (1912) 226 U. S. 14, 20, 33 Sup. Ct. 5, 6, 57 L. ed. 104.

¹⁵¹ See notes 45 to 47 in Chapter 3, *infra*. On the finality of decisions of state courts on questions of fact see *Thomas v. Texas* (1909) 212 U. S. 278, 29 Sup. Ct. 393, 53 L. ed. 512, and notes 45, 46 in Chapter 9, *infra*. And see *Southern P. Co. v. Campbell* (1913) 230 U. S. 537, 33 Sup. Ct. 1027, 57 L. ed. 1610.

CHAPTER III.

THE DUE PROCESS CLAUSES—POSITION OF COURT

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INTRODUCTORY.

The clauses stated.

52. The constitutional restraints which we shall consider in this chapter are the provision contained in the Fifth Amendment "nor shall any person . . . be deprived of life, liberty or property without due process of law" and the provision contained in the Fourteenth

Amendment "nor shall any state deprive any person of life, liberty or property without due process of law."

Clauses relate to different governments.

53. The Fifth Amendment relates to the federal government¹ and does not restrain the state governments,² while the Fourteenth Amendment relates to the state governments³ and does not restrain the federal government.⁴

¹ *Adair v. United States* (1908) 208 U. S. 161, 28 Sup. Ct. 277, 52 L. ed. 436. See also *Ex parte Lange* (1873) 18 Wall. 163, 21 L. ed. 872; *United States v. Lynah* (1903) 188 U. S. 445, 23 Sup. Ct. 349, 47 L. ed. 539; *Monongahela N. Co. v. United States* (1893) 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463; *Garfield v. Goldsby* (1908) 211 U. S. 249, 29 Sup. Ct. 62, 53 L. ed. 168; *United States ex rel. Turner v. Fisher* (1911) 222 U. S. 204, 32 Sup. Ct. 37, 56 L. ed. 165; *Ochoa v. Hernandez y Morales* (1913) 230 U. S. 139, 33 Sup. Ct. 1033, 57 L. ed. 1427.

² *Ensign v. Pennsylvania* (1913) 227 U. S. 592, 597, 33 Sup. Ct. 321, 322, 57 L. ed. 658; *Hunter v. Pittsburgh* (1907) 207 U. S. 161, 176, 28 Sup. Ct. 40, 45, 52 L. ed. 161; *Barrington v. Missouri* (1907) 205 U. S. 483, 27 Sup. Ct. 582, 51 L. ed. 890; *Howard v. Kentucky* (1906) 200 U. S. 164, 26 Sup. Ct. 189, 50 L. ed. 421; *Jack v. Kansas* (1905) 199 U. S. 372, 26 Sup. Ct. 73, 50 L. ed. 234; *Ohio v. Dollison* (1904) 194 U. S. 445, 24 Sup. Ct. 703, 48 L. ed. 1062; *Winous P. S. C. v. Caspersen* (1904) 193 U. S. 189, 24 Sup. Ct. 431, 48 L. ed. 675; *Capital C. D. Co. v. Ohio* (1902) 183 U. S. 238, 22 Sup. Ct. 120, 46 L. ed. 171; *Chapin v. Fye* (1900) 179 U. S. 127, 21 Sup. Ct. 71, 45 L. ed. 119; *Louisville & N. R. Co. v. Woodson* (1890) 134 U. S. 614, 623, 10 Sup. Ct. 628, 631, 33 L. ed. 1032. See also *Twining v. New Jersey* (1908) 211 U. S. 78, 93, 29 Sup. Ct. 14, 17, 53 L. ed. 97; *Ughbanks v. Armstrong* (1908) 208 U. S. 481, 487, 28 Sup. Ct. 372, 374, 52 L. ed. 582; *Corkran O. & D. Co. v. Arnaudet* (1905) 199 U. S. 182, 193, 26 Sup. Ct. 41, 44, 50 L. ed. 143; *Brown v. New Jersey* (1899) 175 U. S. 172, 20 Sup. Ct. 77, 44 L. ed. 119. Compare the language, which was doubtless used thoughtlessly, in *Cincinnati, I. & W. Co. v. Connersville* (1910) 218 U. S. 336, 343, 31 Sup. Ct. 93, 94, 54 L. ed. 1060.

³ See secs. 58, 74, *infra*.

⁴ In view of the wording of the Amendment this point is clear in spite of expressions in *Patterson v. Bark Eudora* (1903) 190 U. S. 169, 23 Sup. Ct. 821, 47 L. ed. 1002; *Plessy v. Ferguson* (1896) 163 U. S. 537, 551, 16 Sup. Ct. 1138, 1143, 41 L. ed. 256; *United States v. Heinze* (1910) 218 U. S. 532, 546, 31 Sup. Ct. 98, 102, 54 L. ed. 1139.

Assumption that in other respects clauses have same meaning.

54. In our discussion of the clauses we shall assume that, standing alone, their terms have the same meanings in both portions of the Constitution.⁵ The United States Supreme Court makes this assumption as a working hypothesis;⁶ and, indeed, as both Amendments are parts of

⁵ Of course, other provisions of the Federal Constitution secure to the individual procedural as well as substantive rights against the federal government which they do not secure to him against state action: see, e. g., *West v. Louisiana* (1904) 194 U. S. 258, 24 Sup. Ct. 650, 48 L. ed. 965; *Maxwell v. Dow* (1900) 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. ed. 597; *Hurtado v. California* (1884) 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. ed. 232; *Walker v. Sauvinet* (1875) 92 U. S. 90, 23 L. ed. 678. This point is to be considered in connection with secs. 86, 87, *infra*.

⁶ "The part of the Constitution then before the court was the Fifth Amendment. If any different meaning of the same words, as they are used in the Fourteenth Amendment, can be conceived, none has yet appeared in judicial decision:" *Twining v. New Jersey* (1908) 211 U. S. 78, 100, 101, 29 Sup. Ct. 14, 20, 53 L. ed. 97. "While we need not affirm that in no instance could a distinction be taken, ordinarily if an Act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth:" *Carroll v. Greenwich I. Co.* (1905) 199 U. S. 401, 410, 26 Sup. Ct. 66, 67, 50 L. ed. 246. "The purpose of [the Fourteenth] Amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress:" *Tonawanda v. Lyon* (1901) 181 U. S. 389, 391, 21 Sup. Ct. 609, 610, 45 L. ed. 908, quoted approvingly in *Hibben v. Smith* (1903) 191 U. S. 310, 325, 24 Sup. Ct. 88, 92, 48 L. ed. 195. We "shall proceed, in the present case, on the assumption that the legal import of the phrase 'due process of law' is the same in both Amendments. Certainly, it cannot be supposed that, by the Fourteenth Amendment, it was intended to impose on the states, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the federal government, in a similar exercise of power, by the Fifth Amendment:" *French v. Barber A. P. Co.* (1901) 181 U. S. 324, 329, 21 Sup. Ct. 625, 627, 45 L. ed. 879. See also references to *Davidson v. New Orleans* (1877) 96 U. S. 97, 103, 104, 24 L. ed. 616, and *Missouri P. Ry. Co. v. Humes* (1885) 115 U. S. 512, 520, 6 Sup. Ct. 110, 112, 29 L. ed. 463, on p. 119, *infra*; *Detroit v. Parker* (1901) 181 U. S. 399, 401, 21 Sup. Ct. 624, 625, 45 L. ed. 917; dissenting opinion in *Tonawanda v. Lyon* (1901) 181 U. S. 389, 393, 21 Sup. Ct. 609, 611, 45 L. ed. 908; *In re Kemmler* (1890) 136 U. S. 436, 448, 10 Sup. Ct. 930, 934,

the same Constitution such a working hypothesis is not unnatural.⁷

Possible points of difference are ignored by the court.

55. The variations in the texts of the two clauses are unimportant,⁸ save, of course, that the clauses relate to different governments; and while the contexts of the clauses are unlike⁹ the court apparently does not consider that fact important. A period of nearly eighty years sep-

34 L. ed. 519; *Hurtado v. California* (1884) 110 U. S. 516, 534, 535, 4 Sup. Ct. 111, 292, 120, 28 L. ed. 232 (in the latter two cases, however, it is possible that a distinction is made; but see discussion of them in note 97 in Chapter 4, *infra*); dissenting opinion in *Wight v. Davidson* (1901) 181 U. S. 371, 387, 21 Sup. Ct. 616, 622, 45 L. ed. 900; opinion of court in *Pittman v. Byars* (1908) 51 Tex. Civ. App. 83, 112 S. W. 102. Compare *Wight v. Davidson* (1901) 181 U. S. 371, 384, 21 Sup. Ct. 616, 621, 45 L. ed. 900, where it is said, "It by no means necessarily follows that a long and consistent construction put upon the Fifth Amendment . . . is to be deemed overruled by a decision concerning the operation of the Fourteenth Amendment as controlling state legislation;" and *French v. Barber A. P. Co.* (1901) 181 U. S. 324, 328, 21 Sup. Ct. 625, 626, 45 L. ed. 879, where it is said, "While the language of those Amendments is the same, yet as they were engrafted upon the Constitution at different times and in different circumstances of our national life, it may be that questions may arise in which different constructions and applications of their provisions may be proper." And see book review by E. A. Corwin in 6 Am. Pol. Sci. Rev. 271.

7 "The Constitution of the United States, with the several Amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity:" *Prout v. Starr* (1903) 188 U. S. 537, 543, 23 Sup. Ct. 398, 400, 47 L. ed. 584. "While the [state] constitution as it now stands is to be considered as a whole as if enacted at one time, to ascertain the meaning of particular expressions it may be necessary to give attention to the circumstances under which they became parts of the instrument:" *Thompson v. Kidder* (1906) 74 N. H. 89, 91, 65 Atl. 392, 393.

⁸ Neither clause is expressly addressed to or confined to any particular branch of government to which it relates, so that it is difficult to see from the texts that either relates to fewer or more branches of government than the other. So far as the texts are concerned, there are as strong reasons for implying "by *any* organ of government" in one provision as in the other—and no stronger reasons.

⁹ See secs. 127, 131, *infra*.

arated the adoptions of the two Amendments, and it has been said that for that reason "it may be that questions may arise in which different constructions and applications of their provisions may be proper";¹⁰ but the court does not seek to interpret either clause from the standpoint of the time of its adoption.¹¹

Importance of understanding the provision.

56. The importance of a correct understanding of the clauses is unquestionable. More decisions of the United States Supreme Court turn upon the due process require-

¹⁰ *French v. Barber A. P. Co.* (1901) 181 U. S. 324, 328, 21 Sup. Ct. 625, 626, 45 L. ed. 879, quoted at end of note 6, *supra*.

¹¹ Yet see *United States v. Burr* (1807) 4 Cranch, 469, 470, 2 L. ed. 684; *Schick v. United States* (1904) 195 U. S. 65, 69, 24 Sup. Ct. 826, 827, 49 L. ed. 99; *Robertson v. Baldwin* (1897) 165 U. S. 275, 281, 17 Sup. Ct. 326, 329, 41 L. ed. 715; *Latimer v. United States* (1912) 223 U. S. 501, 504, 32 Sup. Ct. 242, 56 L. ed. 526; *United States v. Baruch* (1912) 223 U. S. 191, 199, 32 Sup. Ct. 306, 309, 56 L. ed. 399; *Standard Oil Co. v. United States* (1911) 221 U. S. 1, 59, 31 Sup. Ct. 502, 515, 55 L. ed. 619, on the duty of determining whether terms had established meanings when used and, if so, of applying them in accordance with those meanings. Consider also *Sand F. Corp. v. Cowardin* (1909) 213 U. S. 360, 364, 29 Sup. Ct. 509, 510, 53 L. ed. 833; *Maxwell v. Dow* (1900) 176 U. S. 581, 602, 20 Sup. Ct. 448, 494, 456, 44 L. ed. 597; *Standard Oil Co. v. United States* (1911) 221 U. S. 1, 50, 31 Sup. Ct. 502, 512, 55 L. ed. 619; *Pittman v. Byars* (1908) 51 Tex. Civ. App. 83, 112 S. W. 102; discussion in section 83, *infra*.—In the interval between the adoptions of the two Amendments the United States Supreme Court interpreted the provision in the Fifth Amendment and many state courts interpreted similar provisions in state constitutions. The courts so often relied upon unconvincing reasoning that permanent interpretation and uniformity among the several jurisdictions alike seem extremely improbable, although an examination of the state decisions would require too much time to warrant its being made for the purposes of this book. (See, however, Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 460.) Yet if it were shown that the various decisions were in general accord at the time of the adoption of the Fourteenth Amendment those decisions should help to fix the meaning of the Fourteenth Amendment even though they were erroneous as to the provisions they interpreted and were now all overruled. Of course, we must remember that a great deal of weight is due to the interpretations, and especially the un-

ment than upon any other provision of the Constitution. It is true that thirty-six years ago the court, after comparing the infrequency with which the due process clause of the Fifth Amendment had been invoked in the first ninety years of the country's history with the frequency with which the similar clause of the Fourteenth Amendment was being invoked, declared that the fact that its docket was crowded with cases concerning the due process provision furnished "abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment";¹² and that eight years later the language quoted above was repeated "with an expression of increased surprise at the continued misconception of the purpose of the provi-

challenged interpretations, which other departments of the state and federal governments showed by their actions that they placed upon the provisions: see Patterson, *The United States and the States Under the Constitution*, 2d ed., p. 234, and also *United States v. Baruch* (1912) 223 U. S. 191, 200, 32 Sup. Ct. 306, 309, 56 L. ed. 399.

¹² "It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution, as a restraint upon the power of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded:" *Davidsen v. New Orleans* (1877) 96 U. S. 97, 103, 104, 24 L. ed. 616. See also cases in note 51 in Chapter 4, *infra*.

sion.”¹³ But, nevertheless, those clauses are to-day invoked more often than ever before,¹⁴ and, whether or not this is due to a continued misunderstanding of the provision, the fact that the clauses are so often appealed to unquestionably shows the importance of understanding them correctly.

THE “PERSONS” PROTECTED.

57. The term “persons” in the due process provision includes natural persons as a matter of course. The court has also decided repeatedly that the term includes within its scope corporations,¹⁵ both domestic and foreign,¹⁶ al-

¹³ *Missouri P. Ry. Co. v. Humes* (1885) 115 U. S. 512, 520, 6 Sup. Ct. 110, 112, 29 L. ed. 463. See also authorities in note 51 in Chapter 4, *infra*. “At the beginning of the October Term of 1877, the Supreme Court had rendered only nine opinions in cases involving the Fourteenth Amendment. From 1877 to the beginning of the October Term of 1885, twenty-six additional opinions were rendered, making a total of thirty-five for the first sixteen years of the operation of the Amendment. What would the learned Justices have said could they have seen the present-day operation of the Amendment! Within the last thirteen years the Supreme Court has delivered four hundred and nine opinions by way of interpreting section one of the Amendment, this being an average of about thirty-one opinions each year:” Collins, *The Fourteenth Amendment and the States*, 27.

¹⁴ “Within the past forty years the Supreme Court has delivered more than four hundred opinions involving the one question of the states taking property without due process of law. Less than one hundred of these cases arose prior to 1896. More than one-half of all of them deal with the relations of the states to the corporations—the public service companies forming the predominating element. This is, therefore, an intensely modern question and one, it seems, which cannot be solved by the courts:” Collins, *The Fourteenth Amendment and the States*, 116. See also *ibid.* 125; and notes 13, *supra*, and 62, *infra*.

¹⁵ *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858; *Smyth v. Ames* (1898) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Gulf, C. & S. F. Ry. Co. v. Ellis* (1897) 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666; *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560, and cases there cited. Compare Collins, *The Fourteenth Amendment and the States*, 126, 127; and note 4 in Chapter 5, *infra*.—There is a dictum in *Northwestern N. L. I. Co. v. Riggs* (1906) 203 U. S. 243, 255, 27 Sup. Ct. 126, 129, 51 L. ed. 168, repeated in *Western*

though the rights of those corporations may be in some respects less than the rights of natural persons.¹⁷

We have considered elsewhere¹⁸ the question whether it is possible, by charter or otherwise, to bargain away the right to raise constitutional objections to acts of government.

THE ORGANS OF GOVERNMENT RESTRAINED.

Fourteenth Amendment restrains states and their organs.

58. The due process clause of the Fourteenth Amendment applies to action by the state itself through its constitution;¹⁹ and it applies to action by any organ of state

T. Assn. v. Greenberg (1907) 204 U. S. 359, 363, 27 Sup. Ct. 384, 386, 51 L. ed. 520, that "The liberty referred to in that Amendment is the liberty of natural, not artificial, persons." See also *Selover, Bates & Co. v. Walsh* (1912) 226 U. S. 112, 126, 33 Sup. Ct. 69, 72, 57 L. ed. 146. This is true if the term "liberty" is given the meaning which it had when placed in the due process provision: see p. 244, *infra*. But if it is given the meaning which the court now gives to it with reference to natural persons, the thought of the court is not aptly expressed: see 22 *Harv. L. Rev.* 251, 252. The court should have said, rather, that a corporation has fewer rights than a natural person: see note 17, *infra*. And on the question of the "liberty" of corporations, consider also *Adair v. United States* (1908) 208 U. S. 161, 172, 28 Sup. Ct. 277, 279, 52 L. ed. 436.

¹⁶ *Western U. T. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355; *Pullman Co. v. Kansas* (1910) 216 U. S. 56, 30 Sup. Ct. 232, 54 L. ed. 378; *Southern Ry. Co. v. Greene* (1910) 216 U. S. 400, 416, 417, 30 Sup. Ct. 287, 291, 54 L. ed. 536; see also *Carroll v. Greenwich Ins. Co.* (1905) 199 U. S. 401, 409, 26 Sup. Ct. 66, 67, 50 L. ed. 246.

¹⁷ *Hammond P. Co. v. Arkansas* (1909) 212 U. S. 322, 29 Sup. Ct. 370, 53 L. ed. 530; *Berea College v. Kentucky* (1908) 211 U. S. 45, 29 Sup. Ct. 33, 53 L. ed. 81; *National Council J. O. U. A. M. v. State Council* (1906) 203 U. S. 151, 27 Sup. Ct. 46, 51 L. ed. 132. See also *St. Mary's F.-A. P. Co. v. West Virginia* (1906) 203 U. S. 183, 27 Sup. Ct. 132, 51 L. ed. 144. Compare cases in notes 15, 16, *supra*.

¹⁸ See sec. 22, *supra*.

¹⁹ *Louisville & N. R. Co. v. Central S. Y. Co.* (1909) 212 U. S. 132, 29 Sup. Ct. 246, 53 L. ed. 441. On the decision in this case see dissenting opinion and also *Londoner v. Denver* (1908) 210 U. S. 373, 379, 28 Sup. Ct. 708,

government.²⁰ This is true whether the action is by the legislature,²¹ or the judiciary,²² or the officers of the cen-

711, 52 L. ed. 1103, of which the two reports last cited are more complete than that first cited; *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 279, 29 Sup. Ct. 50, 54, 53 L. ed. 176; *Lindsley v. Natural C. G. Co.* (1911) 220 U. S. 61, 73, 31 Sup. Ct. 337, 338, 55 L. ed. 369; dissenting opinion in *Raymond v. Chicago U. T. Co.* (1907) 207 U. S. 20, 41, 28 Sup. Ct. 7, 14, 52 L. ed. 78; cases in note 44 et seq., *infra*.

²⁰ On the significance of the word "state" in the Fourteenth Amendment see sec. 74, *infra*, and note 44, *infra*.

²¹ *Missouri P. Ry. Co. v. Tucker* (1913) 230 U. S. 340, 33 Sup. Ct. 961, 57 L. ed. 1507; *Missouri P. Ry. Co. v. Nebraska* (1910) 217 U. S. 196, 30 Sup. Ct. 461, 54 L. ed. 727; *Western U. T. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355; *Pullman Co. v. Kansas* (1910) 216 U. S. 56, 30 Sup. Ct. 232, 54 L. ed. 378; *Ludwig v. Western U. T. Co.* (1910) 216 U. S. 146, 30 Sup. Ct. 280, 54 L. ed. 423; *Otis Co. v. Ludlow M. Co.* (1906) 201 U. S. 140, 26 Sup. Ct. 353, 50 L. ed. 696; *Union R. T. Co. v. Kentucky* (1905) 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150; *Delaware, L. & W. R. Co. v. Pennsylvania* (1905) 198 U. S. 341, 25 Sup. Ct. 669, 49 L. ed. 1077; *Lochner v. New York* (1905) 198 U. S. 45, 25 Sup. Ct. 539, 49 L. ed. 93; *Bradley v. Lightcap* (1904) 195 U. S. 1, 24 Sup. Ct. 748, 49 L. ed. 65; *Louisville & J. F. Co. v. Kentucky* (1903) 188 U. S. 385, 23 Sup. Ct. 463, 47 L. ed. 513; *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858; *Smyth v. Ames* (1898) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Allgeyer v. Louisiana* (1897) 165 U. S. 578, 17 Sup. Ct. 427, 41 L. ed. 832; *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560. See also *Choate v. Trapp* (1912) 224 U. S. 665, 32 Sup. Ct. 565, 56 L. ed. 941; *Prentiss v. Atlantic C. L. Co.* (1908) 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150; *Chesapeake & P. T. Co. v. Manning* (1902) 186 U. S. 238, 22 Sup. Ct. 881, 46 L. ed. 1144; *Central of Ga. Ry. Co. v. Wright* (1907) 207 U. S. 127, 28 Sup. Ct. 47, 52 L. ed. 134. Compare *Walker v. Sauvinet* (1875) 92 U. S. 90, 23 L. ed. 678.

²² *Selliger v. Kentucky* (1909) 213 U. S. 200, 29 Sup. Ct. 449, 53 L. ed. 761; *Buck v. Beach* (1907) 206 U. S. 392, 27 Sup. Ct. 712, 51 L. ed. 1106; *Wetmore v. Karrick* (1907) 205 U. S. 141, 27 Sup. Ct. 434, 51 L. ed. 745; *Old W. M. L. Assn. v. McDonough* (1907) 204 U. S. 8, 23, 27 Sup. Ct. 236, 241, 51 L. ed. 345; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 594, 26 Sup. Ct. 341, 350, 50 L. ed. 596; *Scott v. McNeal* (1894) 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. ed. 896 (explained in *Cunnius v. Reading School Dist.* (1905) 198 U. S. 458, 475, 25 Sup. Ct. 721, 726, 49 L. ed. 1125); *Fayerweather v. Ritch* (1904) 195 U. S. 276, 25 Sup. Ct. 58, 49 L. ed. 193; *National Ex. Bank v. Wiley* (1904) 195 U. S. 257, 270, 25 Sup. Ct. 70, 75, 49 L. ed. 184; *Green B. & M. C. Co. v. Patten P. Co.* (1898) 172 U. S. 58, 82, 19 Sup. Ct. 97, 106, 43 L. ed. 364 (1899) 173 U. S. 179, 19 Sup. Ct. 316, 43 L. ed. 658; *Missouri P. Ry. Co. v. Nebraska* (1896) 164 U. S. 403, 17

tral administration,²³ although it seems that acts by municipalities,²⁴ or subordinate officers,²⁵ or private indi-

Sup. Ct. 130, 41 L. ed. 489. See also *Prentiss v. Atlantic C. L. Co.* (1908) 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150; *Carter v. Texas* (1900) 177 U. S. 442, 20 Sup. Ct. 687, 44 L. ed. 839; *Backus v. Fort S. U. D. Co.* (1898) 169 U. S. 557, 18 Sup. Ct. 445, 42 L. ed. 853; *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979; *Neal v. Delaware* (1880) 103 U. S. 370, 26 L. ed. 567; *Virginia v. Rives* (1879) 100 U. S. 313, 25 L. ed. 667; *Central of Ga. Ry. Co. v. Wright* (1907) 207 U. S. 127, 28 Sup. Ct. 47, 52 L. ed. 134; *Iron C. Co. v. Negaunee I. Co.* (1905) 197 U. S. 463, 25 Sup. Ct. 474, 49 L. ed. 836; *Madisonville T. Co. v. St. Bernard M. Co.* (1905) 196 U. S. 239, 25 Sup. Ct. 251, 49 L. ed. 462. Compare *Marchant v. Pennsylvania R. Co.* (1894) 153 U. S. 380, 385, 386, 14 Sup. Ct. 894, 896, 38 L. ed. 751; *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 157, 168, 170, 17 Sup. Ct. 56, 62, 66, 67, 41 L. ed. 369; *Morley v. Lake S. & M. S. Ry. Co.* (1892) 146 U. S. 162, 171, 13 Sup. Ct. 54, 58, 36 L. ed. 925; and cases in note 38, *infra*.

²³ *State of Washington ex rel. Oregon R. & N. Co. v. Fairchild* (1912) 224 U. S. 510, 32 Sup. Ct. 535, 56 L. ed. 863; *Railroad Comm. of Louisiana v. Cumberland T. & T. Co.* (1909) 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577; *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970; *Minneapolis E. Ry. Co. v. Minnesota* (1890) 134 U. S. 467, 10 Sup. Ct. 473, 702, 33 L. ed. 985; *Prout v. Starr* (1903) 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584. See also *Home T. & T. Co. v. Los Angeles* (1913) 227 U. S. 278, 33 Sup. Ct. 312, 57 L. ed. 510; *Choate v. Trapp* (1912) 224 U. S. 665, 32 Sup. Ct. 565, 56 L. ed. 941; *Raymond v. Chicago U. T. Co.* (1907) 207 U. S. 20, 28 Sup. Ct. 7, 52 L. ed. 78; *Londoner v. Denver* (1908) 210 U. S. 373, 28 Sup. Ct. 708, 52 L. ed. 1103; *Fargo v. Hart* (1904) 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761; *Missouri P. Ry. Co. v. Nebraska* (1896) 164 U. S. 403, 17 Sup. Ct. 130, 41 L. ed. 489; *Douglas P. J. C. v. Grainger* (1906) 146 Fed. 414; *Spring V. W. v. San Francisco* (1903) 124 Fed. 574. Compare *Arbuckle v. Blackburn* (1903) 191 U. S. 405, 24 Sup. Ct. 148, 48 L. ed. 239; *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 170, 17 Sup. Ct. 56, 67, 41 L. ed. 369; *Hoe v. United States* (1910) 218 U. S. 322, 335, 31 Sup. Ct. 85, 89, 54 L. ed. 1055.

²⁴ In *Barney v. New York* (1904) 193 U. S. 430, 24 Sup. Ct. 502, 48 L. ed. 737, the Supreme Court sustained the refusal of a lower federal court to enjoin the continuance by a board and a contractor with that board, and by a city through them, of conduct which was forbidden by state statute. In *Savannah, T. & I. of H. Ry. v. Savannah* (1905) 198 U. S. 392, 25 Sup. Ct. 690, 49 L. ed. 1097, the above case was cited as authority for the dictum that the collection by a municipality of a tax unauthorized by state law

viduals,²⁶ unless authorized or until supported by the

would not violate the due process clause. The enforcement of that tax had been sustained by the state court. (With this case, however, compare *Raymond v. Chicago U. T. Co.* (1907) 207 U. S. 20, 28 Sup. Ct. 7, 52 L. ed. 78.) In *City of Memphis v. Cumberland T. & T. Co.* (1910) 218 U. S. 624, 31 Sup. Ct. 115, 54 L. ed. 1185, which arose in a federal court, the Supreme Court decided that an ordinance which was unauthorized by state law would not violate the Fourteenth Amendment. And in *City of Dawson v. Columbia A. S. F., S. D., T. & T. Co.* (1905) 197 U. S. 178, 25 Sup. Ct. 420, 49 L. ed. 713; *Shawnee S. & D. Co. v. Stearns* (1911) 220 U. S. 462, 31 Sup. Ct. 452, 55 L. ed. 544, the Supreme Court decided that a breach of contract by a city which was unsupported by statute was not unconstitutional. See also *Portland Ry., L. & P. Co. v. Portland* (1912) 200 Fed. 890; *City of Louisville v. Cumberland T. & T. Co.* (1907) 155 Fed. 725. On the other hand, compare the cases cited in that opinion where municipal action was based on legislation. In *Dobbins v. Los Angeles* (1904) 195 U. S. 223, 25 Sup. Ct. 18, 49 L. ed. 169, the Supreme Court declared unconstitutional an ordinance which had been upheld by the state court and which unwarrantably prevented the building of a gas works. In *Norwood v. Baker* (1898) 172 U. S. 269, 19 Sup. Ct. 187, 43 L. ed. 443, the same court held invalid an ordinance passed in accordance with statute. (Remainder of case practically overruled in *French v. Barber A. P. Co.* (1901) 181 U. S. 324, 21 Sup. Ct. 625, 45 L. ed. 879.) In *North A. C. S. Co. v. Chicago* (1908) 211 U. S. 306, 29 Sup. Ct. 101, 53 L. ed. 195, the court decided that an ordinance passed in accordance with statute must be regarded as an act of the state: the ordinance, however, was sustained. In *Londoner v. Denver* (1908) 210 U. S. 373, 28 Sup. Ct. 708, 52 L. ed. 1103, which arose in a state court, an assessment had been made by a city council, acting as a board of equalization, and a property owner had not been afforded any opportunity for a hearing: the Supreme Court held that the assessment by the council was action by the state, and declared that action to be unconstitutional. And in *Iron M. R. Co. v. Memphis* (1899) 96 Fed. 113, a circuit court of appeals directed a lower court to inquire whether a railroad had so acted as to justify a city in ousting the company from its streets, the legislature having given the city general power over the streets. On the power of local governmental boards see also *Ozark-Bell T. Co. v. City of Springfield* (1905) 140 Fed. 666; *Spring V. W. v. San Francisco* (1903) 124 Fed. 574; *Pacific G. I. Co. v. Ellert* (1894) 64 Fed. 421. The decision in *Riverside & A. Ry. Co. v. Riverside* (1902) 118 Fed. 736, was unsound.

²⁵ See *Barney v. New York* (1904) 193 U. S. 430, 24 Sup. Ct. 502, 48 L. ed. 737; *People v. Van de Carr* (1905) 199 U. S. 552, 26 Sup. Ct. 144, 50 L. ed. 305. Compare *Pacific G. I. Co. v. Ellert* (1894) 64 Fed. 421; *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220, the latter of which was decided under the equal protection provision.

²⁶ *Civil Rights Cases* (1883) 109 U. S. 3, 3 Sup. Ct. 18, 27 L. ed. 835;

state authorities, do not come within the purview of the Constitution;²⁷ and, a fortiori, acts by municipalities which are in excess of authority from the state do not for that reason violate the clause which we are considering.²⁸ Where, however, a municipality, acting within the scope of powers conferred by the state, misuses those powers, such actions may violate the constitutional restraint.²⁹

United States v. Cruikshank (1875) 92 U. S. 542, 554, 23 L. ed. 588. See also *United States v. Harris* (1883) 106 U. S. 629, 1 Sup. Ct. 601, 27 L. ed. 290; *Hodges v. United States* (1906) 203 U. S. 1, 14, 27 Sup. Ct. 6, 7, 51 L. ed. 65; *James v. Bowman* (1903) 190 U. S. 127, 23 Sup. Ct. 678, 47 L. ed. 979.

²⁷ Compare, however, *Home T. & T. Co. v. Los Angeles* (1913) 227 U. S. 278, 33 Sup. Ct. 312, 57 L. ed. 510, where all that it was necessary for the court to say was that "acts done under the authority of a municipal ordinance passed in virtue of power conferred by a state are embraced by the Fourteenth Amendment:" 227 U. S. at 294, 33 Sup. Ct. at 317, 57 L. ed. at 518, and yet the court said, "It may not be doubted that where a state officer under an assertion of power from the state is doing an act which could only be done upon the predicate that there was such power, the inquiry as to the repugnancy of the act to the Fourteenth Amendment cannot be avoided by insisting that there is a want of power. That is to say, a state officer cannot on the one hand as a means of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding the application of the Amendment, deny the power and thus accomplish the wrong:" 227 U. S. at 288, 33 Sup. Ct. at 315, 57 L. ed. at 515. But see *Hooe v. United States* (1910) 218 U. S. 322, 335, 31 Sup. Ct. 85, 89, 54 L. ed. 1055.

²⁸ *Owensboro W. Co. v. Owensboro* (1906) 200 U. S. 38, 26 Sup. Ct. 249, 50 L. ed. 361.

²⁹ The Amendment provides "for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrongdoer. That is to say, the theory of the Amendment is that where an officer or other representative of a state in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power. To speak broadly, the difference between the proposition insisted upon and the true meaning of the Amendment is

Fifth Amendment restrains organs of federal government.

59. As we have already noted,³⁰ the Supreme Court proceeds upon the assumption that the due process provision has in general the same meaning in both the Fifth Amendment and the Fourteenth Amendment, save, of course, that the Fifth Amendment relates only to the federal government while the Fourteenth Amendment relates to the governments of the several states. The decisions which have been rendered under the Fourteenth Amendment are, therefore, usually pertinent by way of analogy in cases which arise under the Fifth Amendment, although it goes without saying that the Fifth Amendment does not prohibit the making of changes in the Federal Constitution.³¹

But few cases have arisen under the due process clause of the Fifth Amendment. There are, however, decisions that the clause restrains Congress³² and that it restrains the heads of departments.³³

this, that the one assumes that the Amendment virtually contemplates alone wrongs authorized by a state and gives only power accordingly, while in truth the Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment. In other words, the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs which it prohibits, proceeds not merely upon the assumption that states acting in their governmental capacity in a complete sense may do acts which conflict with its provisions, but, also conceiving, what was more normally to be contemplated, that state powers might be abused by those who possessed them and as a result might be used as the instrument for doing wrongs, provided against all and every such possible contingency." *Home T. & T. Co. v. Los Angeles* (1913) 227 U. S. 278, 287, 33 Sup. Ct. 312, 315, 57 L. ed. 510.

³⁰ Sec. 54, *supra*.

³¹ Compare note 19, *supra*, as to the Fourteenth Amendment as a restraint upon state action even though authorized by the state constitution.

³² *Adair v. United States* (1908) 208 U. S. 161, 28 Sup. Ct. 277, 52 L. ed. 436. See also *Choate v. Trapp* (1912) 224 U. S. 665, 32 Sup. Ct. 565, 56 L. ed. 941.

³³ *Garfield v. Goldsby* (1908) 211 U. S. 249, 29 Sup. Ct. 62, 53 L. ed. 168.

Organs for establishing limitations upon rates.

60. The fact that limitations upon rates were decreed by a court, which followed judicial procedure, would not necessarily satisfy the due process requirement;³⁴ nor would the mere fact that they were imposed by legislative³⁵ or administrative³⁶ action make their enforcement

See also *United States ex rel. Turner v. Fisher* (1911) 222 U. S. 204, 32 Sup. Ct. 37, 56 L. ed. 165; *Ochoa v. Hernandez y Morales* (1913) 230 U. S. 139, 33 Sup. Ct. 1033, 57 L. ed. 1427. Compare *Hooe v. United States* (1910) 218 U. S. 322, 31 Sup. Ct. 85, 54 L. ed. 1055; *United States ex rel. Knight v. Lane* (1913) 228 U. S. 6, 33 Sup. Ct. 407, 57 L. ed. 709.

³⁴ See *Backus v. Fort S. U. D. Co.* (1898) 169 U. S. 557, 18 Sup. Ct. 445, 42 L. ed. 853; *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979, and other cases in note 22, *supra*. It is true, however, that in consequence of the Seventh Amendment a federal court, other than that in which the trial took place, cannot consider whether the verdict of the jury in a trial at common law was against the weight of the evidence: see p. 363, *infra*.

³⁵ *Chesapeake & P. T. Co. v. Manning* (1902) 186 U. S. 238, 22 Sup. Ct. 881, 46 L. ed. 1144; *Chicago & G. T. Ry. Co. v. Wellman* (1892) 143 U. S. 339, 12 Sup. Ct. 400, 30 L. ed. 176; *Munn v. Illinois* (1876) 94 U. S. 113, 24 L. ed. 77; *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 594, 17 Sup. Ct. 198, 204, 41 L. ed. 560; *St. Louis & S. F. Ry. Co. v. Gill* (1895) 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567; *Budd v. New York* (1892) 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247; *Dow v. Beidelman* (1888) 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841; *Chicago, B. & Q. R. Co. v. Iowa* (1876) 94 U. S. 155, 24 L. ed. 94. See also *Cotting v. Kansas C. S. Y. Co.* (1901) 183 U. S. 79, 85, 22 Sup. Ct. 30, 33, 46 L. ed. 92; *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858; *Smyth v. Ames* (1898) 171 U. S. 361, 18 Sup. Ct. 488, 43 L. ed. 197, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 397, 14 Sup. Ct. 1047, 1054, 38 L. ed. 1014; *Georgia R. & B. Co. v. Smith* (1888) 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377; *Ruggles v. Illinois* (1883) 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 812; *Stone v. Farmers' L. & T. Co.* (1886) 116 U. S. 307, 335, 6 Sup. Ct. 334, 1191, 347, 29 L. ed. 636.

³⁶ In *Atlantic C. L. R. Co. v. Florida* (1906) 203 U. S. 256, 27 Sup. Ct. 108, 51 L. ed. 174; *Seaboard A. L. Ry. v. Florida* (1906) 203 U. S. 261, 27 Sup. Ct. 109, 51 L. ed. 175; *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151; *Georgia R. & B. Co. v. Smith* (1888) 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377; *Stone v. Farmers' L. & T. Co.* (1886) 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29

violative of that requirement. Limitations which municipal authorities have placed upon the charges of quasi-public corporations have been sustained.³⁷

It is, therefore, clear that judicial participation in the establishment of rates is not essential.³⁸ Indeed, the court has declared that "the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."³⁹

L. ed. 636; *Stone v. Illinois C. R. Co.* (1886) 116 U. S. 347, 6 Sup. Ct. 348, 388, 1191, 29 L. ed. 650, the court upheld rate regulations by state commissions, and in *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Reagan v. Mercantile T. Co.* (1894) 154 U. S. 413, 418, 14 Sup. Ct. 1060, 1062, 38 L. ed. 1028, while the court decided that the schedules ordered by the commission were too low, it also decided that the commission might establish other schedules. See also *Smyth v. Ames* (1898) 171 U. S. 361, 18 Sup. Ct. 488, 43 L. ed. 197; *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; *Interstate Com. Comm. v. Cincinnati, N. O. & T. P. Ry. Co.* (1897) 167 U. S. 479, 494, 17 Sup. Ct. 896, 898, 42 L. ed. 243. In none of the above cases did the court discuss the bearing of the due process clauses upon procedure.

³⁷ *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371; *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 29 Sup. Ct. 50, 53 L. ed. 176; *San Diego L. & T. Co. v. National City* (1899) 174 U. S. 739, 19 Sup. Ct. 804, 43 L. ed. 1154; see also *Burlington, C. R. & N. Ry. Co. v. Dey* (1891) 82 Iowa, 312, 48 N. W. 98, 12 L. R. A. 436; *People's G. L. & C. Co. v. Chicago* (1904) 194 U. S. 1, 24 Sup. Ct. 520, 48 L. ed. 851; *Owensboro v. Owensboro W. Co.* (1903) 191 U. S. 358, 24 Sup. Ct. 82, 48 L. ed. 217.

³⁸ Compare *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970; *Ex parte Young* (1908) 209 U. S. 123, 147, 148, 166, 28 Sup. Ct. 441, 448, 449, 456, 52 L. ed. 714, 13 L. R. A. N. S. 932, 942, 950; *Missouri P. Ry. Co. v. Tucker* (1913) 230 U. S. 340, 33 Sup. Ct. 961, 57 L. ed. 1507, referred to in note 16 of Chapter 2, *supra*. But see note 51, *infra*.

³⁹ *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 8, 29 Sup. Ct. 148,

THE EXTENT OF THE RESTRAINT.**The proper scope of the provision.**

61. In a later chapter⁴⁰ we shall see that there are not merely sufficient but abundant reasons for saying that the court should hold that the due process provision simply requires that governmental commands be enforced only in the manner prescribed by the law of the land, and that the court should admit that the law of the land upon federal matters may be changed by the appropriate federal authorities, subject only to the provisions of the Federal Constitution, and that the law of the land upon state matters may be altered by the appropriate state authorities, subject only to the Federal Constitution, to laws and treaties made in accordance with that Constitution, and to the state constitution. In short, the court should hold that the provision applies merely to the manner of enforcing governmental commands, and it should hold that the provision does require that such commands be enforced only in the manner prescribed by the law of the land.

150, 53 L. ed. 371. See also *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 271, 278, 29 Sup. Ct. 50, 51, 54, 53 L. ed. 176; *Prentiss v. Atlantic C. L. Co.* (1908) 211 U. S. 210, 29 Sup. Ct. 67, 53 L. ed. 150; *Honolulu R. T. & L. Co. v. Hawaii* (1908) 211 U. S. 282, 29 Sup. Ct. 55, 53 L. ed. 186; note 19 in Chapter 2, *supra*; *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 515, 22 Sup. Ct. 95, 100, 46 L. ed. 298; *Munn v. Illinois* (1876) 94 U. S. 113, 133, 134, 24 L. ed. 77; *Chesapeake & P. T. Co. v. Manning* (1902) 186 U. S. 238, 244, 22 Sup. Ct. 881, 884, 46 L. ed. 1144; *Gilmore, Governmental Regulation of Prices*, 17 *Green Bag*, 627; *White, Government Control of Transportation Charges*, 37 *Am. L. Reg. N. S.* 721, 729; *Freund, Police Power*, p. 382; *Stimson, Federal and State Constitutions*, book II, chap. 2; *Code of Hammurabi*, secs. 271, 272, 276, 277; and *Spring V. W. v. San Francisco* (1903) 124 *Fed.* 574; *Western U. T. Co. v. Myatt* (1899) 98 *Fed.* 335; *Capital C. G. Co. v. Des Moines* (1896) 72 *Fed.* 818, 822.

⁴⁰ See Chapter 4, where these questions are discussed at length.

The position of the court.

62. The court, however, does not take either of these positions. It takes a position which does not rest upon either history, sound logic or a literal interpretation of the terms of the provision.⁴¹ The court says that the clauses relate not only to procedure but also to substantive law.⁴² It does not regard them as requiring that governmental actions comply with the law of the land. And it practically regards the provision as authorizing the court to impose upon governmental actions such tests of fitness as the court itself may choose to impose.

A suitable procedure.

63. The court has taken several inconsistent positions with regard to the procedural restraint which is imposed by the due process provision.⁴³ The position, however,

⁴¹ See Chapter 4, *infra*, where these questions are discussed at length.

⁴² See sec. 66, *infra*.

⁴³ In *Murray's Lessee v. Hoboken L. & I. Co.* (1855) 18 How. 272, 276, 15 L. ed. 372, it is said, "It is manifest that it was not left to the legislative power to enact any process which might be devised." On the other hand, in *Walker v. Sauvinet* (1875) 92 U. S. 90, 93, 23 L. ed. 678, it is said, "This requirement of the Constitution is met if the trial is had according to the settled course of legal proceedings. Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state." See also *Missouri v. Lewis* (1879) 101 U. S. 22, 31, 25 L. ed. 989; *Hurtado v. California* (1884) 110 U. S. 516, 535, 4 Sup. Ct. 111, 292, 120, 28 L. ed. 232; *In re Kemmler* (1890) 136 U. S. 436, 448, 10 Sup. Ct. 930, 934, 34 L. ed. 519. In *Arrowsmith v. Harmoning* (1886) 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. ed. 243, it is declared to be sufficient if the legislature prescribed a suitable procedure although the state court made a material departure from that procedure. See also *Kennard v. Louisiana* (1875) 92 U. S. 480, 481, 23 L. ed. 478; *Turpin v. Lemon* (1902) 187 U. S. 51, 57, 23 Sup. Ct. 20, 23, 47 L. ed. 70. It is not clear that in *Baltimore T. Co. v. Baltimore B. R. Co.* (1894) 151 U. S. 137, 14 Sup. Ct. 294, 38 L. ed. 102, the Supreme Court took a position similar to that in *Arrowsmith v. Harmoning*, although the official reporter thought that it did. On the other hand, in *Home T. & T. Co. v. Los*

which is best supported by the trend of decisions is that which was taken by the court when it said that in cases arising under the Fourteenth Amendment "The only question for us is whether a state could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms."⁴⁴ In cases coming from

Angeles (1908) 211 U. S. 265, 279, 29 Sup. Ct. 50, 54, 53 L. ed. 176; *Paulsen v. Portland* (1893) 149 U. S. 30, 38, 13 Sup. Ct. 750, 752, 753, 37 L. ed. 637, it is held that if notice and hearing are given the fact that they are not required by statute is immaterial. With the cases last cited, contrast the decision in *Louisville & N. R. Co. v. Central S. Y. Co.* (1909) 212 U. S. 132, 144, 29 Sup. Ct. 246, 248, 53 L. ed. 441, which did not deal with procedure, and expressions in opinions there cited, some of which did deal with procedure. It has been declared that when a state court is acting within its jurisdiction under a valid statute the Supreme Court will not consider whether the state court has followed the procedure prescribed by statute: see note 46, *infra*. In some cases, as in *Arrowsmith v. Harmoning*, the view is that the Amendment binds only the legislature; in other cases, as in *Rawlins v. Georgia* (1906) 201 U. S. 638, 639, 26 Sup. Ct. 560, 50 L. ed. 899, "If the state constitution and laws, as construed by the state court, are consistent with the Fourteenth Amendment, we can go no further. The only question for us is whether a state could authorize the course of proceedings adopted, if that course were prescribed by its constitution in express terms." In *Lowe v. Kansas* (1896) 163 U. S. 81, 85, 16 Sup. Ct. 1031, 1033, 41 L. ed. 78, where a procedure authorized by state statute is sustained, the court says, "Whether the mode of proceeding prescribed by this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country since it became a nation, in similar cases," citing *Murray's Lessee v. Hoboken L. & I. Co.*, *supra*, and *Dent v. West Virginia* (1889) 129 U. S. 114, 9 Sup. Ct. 231, 32 L. ed. 623. The latter case does not support this proposition. The former case refers to the Fifth Amendment, and, of course, the law and usage at the time of the adoption of the Fourteenth Amendment were not necessarily the same as the law and usage at the time of the adoption of the Fifth Amendment. On the subject of this note in general and more especially the language in *Lowe v. Kansas*, *supra*, see also *Twining v. New Jersey* (1908) 211 U. S. 78, 28 Sup. Ct. 14, 53 L. ed. 97, referred to on p. 169, *infra*. Compare the statement in *Montana Co. v. St. Louis M. & M. Co.* (1894) 152 U. S. 160, 168, 14 Sup. Ct. 506, 508, 38 L. ed. 398, that "the question whether a certain proceeding is due process of law is not determined by the matter of age."

⁴⁴ *Rawlins v. Georgia* (1906) 201 U. S. 638, 640, 26 Sup. Ct. 560, 50 L. ed. 899. See also *Lindsley v. Natural C. G. Co.* (1911) 220 U. S. 61, 73,

state courts the court does not inquire whether the action of an organ of state government conforms to the procedural requirements of the state constitution⁴⁵ or to other valid procedural restraints upon the organs of government;⁴⁶ and in cases arising in federal courts those courts

31 Sup. Ct. 337, 338, 55 L. ed. 369; *Patterson v. Colorado* (1907) 205 U. S. 454, 460, 27 Sup. Ct. 556, 557, 51 L. ed. 879; *Ballard v. Hunter* (1907) 204 U. S. 241, 260, 27 Sup. Ct. 261, 268, 51 L. ed. 461; *Owensboro W. Co. v. Owensboro* (1906) 200 U. S. 38, 47, 26 Sup. Ct. 249, 252, 50 L. ed. 361; *Hammond P. Co. v. Arkansas* (1909) 212 U. S. 322, 349, 350, 29 Sup. Ct. 370, 379, 53 L. ed. 530; *St. Louis, I. M. & S. Ry. Co. v. Taylor* (1908) 210 U. S. 281, 285, 28 Sup. Ct. 616, 617, 52 L. ed. 1061; *People ex rel. New Y. C. & H. R. R. Co. v. Miller* (1906) 202 U. S. 584, 595, 26 Sup. Ct. 714, 716, 50 L. ed. 1155; *Soper v. Lawrence Bros. Co.* (1906) 201 U. S. 359, 370, 26 Sup. Ct. 473, 475, 50 L. ed. 788; *Portland Ry., L. & P. Co. v. Railroad Comn. of Oregon* (1913) 229 U. S. 397, 409, 410, 33 Sup. Ct. 820, 826, 57 L. ed. 1248; *Selover, Bates & Co. v. Walsh* (1912) 226 U. S. 112, 33 Sup. Ct. 69, 57 L. ed. 146.

⁴⁵ *Ensign v. Pennsylvania* (1913) 227 U. S. 592, 33 Sup. Ct. 321, 57 L. ed. 658; *Ross v. Oregon* (1913) 227 U. S. 150, 33 Sup. Ct. 220, 57 L. ed. 458; *West v. Louisiana* (1904) 194 U. S. 258, 24 Sup. Ct. 650, 48 L. ed. 965; *Brown v. New Jersey* (1899) 175 U. S. 172, 20 Sup. Ct. 77, 44 L. ed. 119; *Hallinger v. Davis* (1892) 146 U. S. 314, 319, 13 Sup. Ct. 105, 107, 36 L. ed. 986; *Smith v. Jennings* (1907) 206 U. S. 276, 278, 27 Sup. Ct. 610, 611, 51 L. ed. 1061; and see *Southern P. Co. v. Campbell* (1913) 230 U. S. 537, 33 Sup. Ct. 1027, 57 L. ed. 1610; *Graham v. West Virginia* (1912) 224 U. S. 616, 32 Sup. Ct. 583, 56 L. ed. 917; *Walker v. Sauvinet* (1875) 92 U. S. 90, 23 L. ed. 678; *Stickney v. Kelsey* (1908) 209 U. S. 419, 420, 28 Sup. Ct. 508, 509, 52 L. ed. 863; *Patterson v. Colorado* (1907) 205 U. S. 454, 27 Sup. Ct. 556, 51 L. ed. 879; *Burt v. Smith* (1906) 203 U. S. 129, 135, 27 Sup. Ct. 37, 39, 51 L. ed. 121; *Forsyth v. Hammond* (1897) 166 U. S. 506, 518, 17 Sup. Ct. 665, 670, 41 L. ed. 1095; *Long I. W. S. Co. v. Brooklyn* (1897) 166 U. S. 685, 17 Sup. Ct. 718, 41 L. ed. 1165; *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 154, 155, 17 Sup. Ct. 56, 61, 62, 41 L. ed. 360; *Missouri P. Ry. Co. v. Kansas* (1910) 216 U. S. 262, 272, 30 Sup. Ct. 330, 333, 54 L. ed. 472; *Twining v. New Jersey* (1908) 211 U. S. 78, 91, 29 Sup. Ct. 14, 16, 53 L. ed. 97; *Hunter v. Pittsburgh* (1907) 207 U. S. 161, 170, 176, 28 Sup. Ct. 40, 44, 45, 52 L. ed. 151; *Wilson v. North Carolina* (1898) 169 U. S. 586, 593, 594, 18 Sup. Ct. 435, 438, 42 L. ed. 865; and note 47, *infra*. Compare the peculiar decision in *Louisville & N. R. Co. v. Central S. Y. Co.* (1909) 212 U. S. 132, 29 Sup. Ct. 246, 53 L. ed. 441, from which three justices dissented.

⁴⁶ *Watson v. Maryland* (1910) 218 U. S. 173, 175, 30 Sup. Ct. 644, 645,

follow the interpretations which have been given to the state constitutions and the state statutes by the state courts.⁴⁷

54 L. ed. 987; *Rusch v. John Duncan L. & M. Co.* (1909) 211 U. S. 526, 29 Sup. Ct. 172, 53 L. ed. 312; *Castillo v. McConnico* (1898) 168 U. S. 674, 683, 684, 18 Sup. Ct. 229, 233, 42 L. ed. 622; *Moore v. Missouri* (1895) 159 U. S. 673, 16 Sup. Ct. 179, 40 L. ed. 301; *Brinkmeier v. Missouri P. Ry. Co.* (1912) 224 U. S. 268, 32 Sup. Ct. 412, 56 L. ed. 758; *Ballard v. Hunter* (1907) 204 U. S. 241, 259, 260, 27 Sup. Ct. 261, 268, 51 L. ed. 461; *French v. Taylor* (1905) 199 U. S. 274, 277, 28 Sup. Ct. 76, 77, 50 L. ed. 189; *Patterson v. Colorado* (1907) 205 U. S. 454, 27 Sup. Ct. 556, 51 L. ed. 879; *Rawlins v. Georgia* (1906) 201 U. S. 638, 26 Sup. Ct. 560, 50 L. ed. 899; *Long I. W. S. Co. v. Brooklyn* (1897) 166 U. S. 685, 688, 17 Sup. Ct. 718, 719, 41 L. ed. 1165; *Iowa C. Ry. Co. v. Iowa* (1896) 160 U. S. 389, 394, 16 Sup. Ct. 344, 345, 40 L. ed. 467. See also *Londoner v. Denver* (1908) 210 U. S. 373, 379, 28 Sup. Ct. 708, 711, 52 L. ed. 1103 (the two reports last cited being more complete than that first cited); *Barrington v. Missouri* (1907) 205 U. S. 483, 27 Sup. Ct. 582, 51 L. ed. 890; *National C. O. Co. v. Texas* (1905) 197 U. S. 115, 130, 131, 25 Sup. Ct. 379, 382, 49 L. ed. 689; *Forsyth v. Hammond* (1897) 166 U. S. 506, 518, 519, 17 Sup. Ct. 665, 670, 41 L. ed. 1095; *Olsen v. Smith* (1904) 195 U. S. 332, 342, 25 Sup. Ct. 52, 54, 49 L. ed. 224; *W. W. Cargill Co. v. Minnesota* (1901) 180 U. S. 452, 466, 21 Sup. Ct. 423, 428, 45 L. ed. 619; *Maiorano v. Baltimore & O. R. Co.* (1909) 213 U. S. 268, 29 Sup. Ct. 424, 53 L. ed. 792; *Boston Chamber of Com. v. Boston* (1910) 217 U. S. 189, 194, 30 Sup. Ct. 459, 460, 54 L. ed. 725; *Grenada L. Co. v. Mississippi* (1910) 217 U. S. 433, 440, 30 Sup. Ct. 535, 538, 54 L. ed. 826; *Standard Oil Co. v. Tennessee* (1910) 217 U. S. 413, 422, 30 Sup. Ct. 543, 544, 54 L. ed. 817; *Consolidated R. Co. v. Vermont* (1908) 207 U. S. 541, 551, 28 Sup. Ct. 178, 180, 52 L. ed. 327; *Gibson v. Mississippi* (1896) 162 U. S. 565, 591, 16 Sup. Ct. 904, 910, 40 L. ed. 1075; *Turpin v. Lemon* (1902) 187 U. S. 51, 57, 23 Sup. Ct. 20, 23, 47 L. ed. 70; *Hooker v. Los Angeles* (1903) 188 U. S. 314, 319, 23 Sup. Ct. 395, 397, 47 L. ed. 487; *Marchant v. Pennsylvania R. Co.* (1894) 153 U. S. 380, 386, 14 Sup. Ct. 894, 896, 38 L. ed. 751; *Hagar v. Reclamation Dist.* (1884) 111 U. S. 701, 713, 4 Sup. Ct. 663, 670, 28 L. ed. 569. Compare 111 U. S. 708, 4 Sup. Ct. 667, 28 L. ed. 572; *Cross v. North Carolina* (1889) 132 U. S. 131, 140, 10 Sup. Ct. 47, 50, 33 L. ed. 287; *Marx v. Hanthorn* (1893) 148 U. S. 172, 180, 13 Sup. Ct. 508, 510, 37 L. ed. 410 (the last of which did not arise under the due process requirement). On this note see also cases in note 77, *infra*.

⁴⁷ *Peters v. Broward* (1912) 222 U. S. 483, 492, sub nom. *Peters v. Gilchrist*, 32 Sup. Ct. 122, 124, 56 L. ed. 278; *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 154, 155, 17 Sup. Ct. 56, 61, 62, 41 L. ed. 369; *Michigan C. R. Co. v. Powers* (1906) 201 U. S. 245, 291, 26 Sup. Ct. 459, 461, 50 L. ed. 744; *Palmer v. Texas* (1909) 212 U. S. 118, 131, 29 Sup. Ct.

Upon the same principle, the court would not regard the due process clause of the Fifth Amendment as one source of its authority to inquire whether the action of

230, 234, 53 L. ed. 435; and see authorities cited in Patterson, *The United States and the States Under the Constitution*, 2d ed., p. 282.—It may also be added that in a case coming from a state court the Federal Supreme Court would not inquire into the correctness of a decision of the state court that the action of an organ of state government conformed to requirements of the state constitution which were other than procedural: *Old C. T. Co. v. Omaha* (1913) 230 U. S. 100, 116, 33 Sup. Ct. 967, 971, 57 L. ed. 1410; *City of Chicago v. Sturges* (1911) 222 U. S. 313, 321, 32 Sup. Ct. 92, 56 L. ed. 215; *Southwestern Oil Co. v. Texas* (1910) 217 U. S. 114, 118, 119, 30 Sup. Ct. 496, 497, 54 L. ed. 688; *Berea College v. Kentucky* (1908) 211 U. S. 45, 29 Sup. Ct. 33, 53 L. ed. 81; *Hairston v. Danville & W. Ry. Co.* (1908) 208 U. S. 598, 605, 28 Sup. Ct. 331, 334, 52 L. ed. 637; *Muller v. Oregon* (1908) 208 U. S. 412, 417, 28 Sup. Ct. 324, 325, 52 L. ed. 551; *Seaboard A. L. Ry. v. Seegers* (1907) 207 U. S. 73, 76, 28 Sup. Ct. 28, 29, 52 L. ed. 108; *Chanler v. Kelsey* (1907) 205 U. S. 466, 27 Sup. Ct. 550, 51 L. ed. 882; *Western T. Assn. v. Greenberg* (1907) 204 U. S. 359, 27 Sup. Ct. 384, 51 L. ed. 520; *St. Mary's F.-A. P. Co. v. West Virginia* (1906) 203 U. S. 183, 192, 27 Sup. Ct. 132, 135, 51 L. ed. 144; *Jack v. Kansas* (1905) 199 U. S. 372, 26 Sup. Ct. 73, 50 L. ed. 234; *Orr v. Gilman* (1902) 183 U. S. 278, 283, 22 Sup. Ct. 213, 217, 46 L. ed. 213; *Backus v. Fort S. U. D. Co.* (1898) 169 U. S. 557, 566, 568, 18 Sup. Ct. 445, 449, 42 L. ed. 853; *Merchants' & M. Bank v. Pennsylvania* (1897) 167 U. S. 461, 17 Sup. Ct. 829, 42 L. ed. 236; *Adams Ex. Co. v. Ohio State Auditor* (1897) 165 U. S. 194, 219, 17 Sup. Ct. 305, 308, 41 L. ed. 683; *Slaughter House Cases* (1873) 16 Wall. 36, 66, 21 L. ed. 394. See also *Bradley v. Richmond* (1913) 227 U. S. 477, 33 Sup. Ct. 318, 57 L. ed. 603; *Preston v. Chicago* (1913) 226 U. S. 447, 450, 33 Sup. Ct. 177, 178, 57 L. ed. 293; *Moffitt v. Kelly* (1910) 218 U. S. 400, 405, 31 Sup. Ct. 79, 80, 81, 54 L. ed. 1086; *Welch v. Swasey* (1909) 214 U. S. 91, 104, 29 Sup. Ct. 567, 570, 53 L. ed. 923; *Mobile, J. & K. C. R. Co. v. Mississippi* (1908) 210 U. S. 187, 202, 28 Sup. Ct. 650, 655, 52 L. ed. 1016; *Smithsonian Inst. v. St. John* (1909) 214 U. S. 19, 29 Sup. Ct. 601, 53 L. ed. 892; *Maiorano v. Baltimore & O. R. Co.* (1909) 213 U. S. 268, 272, 29 Sup. Ct. 424, 425, 53 L. ed. 792; *Boston Chamber of Commerce v. Boston* (1910) 217 U. S. 189, 194, 30 Sup. Ct. 459, 460, 54 L. ed. 725; and note 77, *infra*. Compare the peculiar decision in *Louisville & N. R. Co. v. Central S. Y. Co.* (1909) 212 U. S. 132, 29 Sup. Ct. 246, 53 L. ed. 441, from which three justices dissented.—On the question whether the state court may by any alteration by construction of the state constitution destroy any substantial rights which have accrued under a valid contract: see sec. 190, *infra*. Of course, until a state court decides whether a law is or is not in accordance with the state constitution, a federal court may pass upon the question in cases in which there is some other basis for

an organ of the federal government complied with the procedural requirements of the Federal Constitution or a federal statute.

As to both Amendments we may say that the general position of the court is expressed in the statement that "consistently with the requirement of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of the government."⁴⁸ The propriety of this position will be considered in a later chapter.⁴⁹

Procedure in establishing limitations upon rates.

64. The Amendments obviously do not prescribe any course of legislative procedure,⁵⁰ and it is not clear that

the court to take jurisdiction: see *Fallbrook Irr. Dist v. Bradley* (1896) 164 U. S. 112, 155, 17 Sup. Ct. 56, 62, 41 L. ed. 369; *Michigan C. R. Co. v. Powers* (1906) 201 U. S. 245, 291, 26 Sup. Ct. 459, 461, 50 L. ed. 744.

⁴⁸ *Twining v. New Jersey* (1908) 211 U. S. 78, 101, 29 Sup. Ct. 14, 20, 53 L. ed. 97. See also *Hammond P. Co. v. Arkansas* (1909) 212 U. S. 322, 349, 350, 29 Sup. Ct. 370, 379, 53 L. ed. 530.

⁴⁹ Chapter 4, *infra*.

⁵⁰ In *Chesapeake & P. T. Co. v. Manning* (1902) 186 U. S. 238, 245, 22 Sup. Ct. 881, 884, 46 L. ed. 1144, the court said, "It is well-settled that the courts always presume that the legislature acts advisedly and with full knowledge of the situation. Such knowledge can be acquired in other ways than by the formal investigation of a committee, and courts cannot inquire how the legislature obtained its knowledge. They must accept its action as that of a body having full power to act, and only acting when it has acquired sufficient information to justify its action." The court also speaks of the conclusiveness of the authentication of the due passage of the act. See also *St. Louis & S. F. R. Co. v. Hadley* (1909) 168 Fed. 317, 353, 354. The position taken by the Supreme Court of the United States in the passage quoted seems far more reasonable than that taken in *Pennsylvania R. Co. v. Philadelphia County* (1906) 220 Pa. 100, 115, 68 Atl. 676, 679, 15 L. R. A. N. S. 108, 117; *Cumberland T. & T. Co. v. Railroad Comm. of*

they prescribe any course of procedure which must be followed by administrative bodies when establishing limitations upon rates.⁵¹

Procedure in enforcing limitations upon rates.

65. The determination of the question whether or not the law has been complied with is, however, entrusted to

La. (1907) 156 Fed. 823; Freund, *Constitutional Limitations and Labor Legislation*, 4 Ill. L. Rev. 609, 622.

⁵¹ In *Mercantile T. Co. v. Texas & P. Ry. Co.* (1892) 51 Fed. 529, 541, the circuit court criticized the procedure of the Texas commission, which promulgated schedules after a public hearing in which there was a general discussion of rates but apparently no systematic treatment of the several items in the schedules afterwards ordered; but, on appeal, *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Reagan v. Mercantile T. Co.* (1894) 154 U. S. 413, 418, 14 Sup. Ct. 1060, 1062, 38 L. ed. 1028, the court of last resort decreed that while the schedules under review were unconstitutionally low, the commission might establish other schedules, and by silence the court sanctioned the procedure of the commission. See also *Home T. & T. Co. v. Los Angeles*, *infra*; *Bauman v. Ross* (1897) 167 U. S. 548, 593, 17 Sup. Ct. 966, 983, 42 L. ed. 270; *Southern P. Co. v. Board of R. Comrs.* (1896) 78 Fed. 236, 258; concurring opinion in *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 460, 10 Sup. Ct. 462, 703, 33 L. ed. 970. Compare opinion of court in latter case, 134 U. S. 457, 10 Sup. Ct. 467, 33 L. ed. 981; *San Diego L. & T. Co. v. National City* (1899) 174 U. S. 739, 19 Sup. Ct. 804, 43 L. ed. 1154. In *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 278, 29 Sup. Ct. 50, 54, 53 L. ed. 176, the court said, "Rate regulation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation would not seem to be indispensable. It may be that the authority to regulate rates, conferred upon the city council by sec. 31 of the charter, is not an authority, arbitrarily, and without investigation, to fix rates of charges, and that if charges were fixed in that manner the act would be beyond the authority of the council. It is not unlikely that the California courts would give this construction to the ordinance. Acting within the authority thus limited it would seem that the character and extent of the investigation made and notice and hearing afforded, in the exercise of this legislative function, would be left to the discretion of the body exercising it. . . . But we need not now decide whether notice and hearing were required. Both were given in this case. . . . If notice and an opportunity to be heard were indispensable, which we do not decide, it is enough that, al-

the courts.⁵² "Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction,⁵³ and that there shall be notice and opportunity for hearing given the parties.⁵⁴ Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized coun-

though the charter be silent, such notice and hearing were afforded by ordinance, as in this case." Consider note in 19 Harv. L. Rev. at 607.

⁵² *Interstate Com. Comn. v. Brimson* (1894) 154 U. S. 447, 485, 14 Sup. Ct. 1125, 1136, 38 L. ed. 1047; concurring opinion in *Winchester & S. R. Co. v. Commonwealth* (1906) 106 Va. 264, 281, 55 S. E. 692, 698. Compare discussion in *Louisville & N. R. Co. v. Shiler* (1911) 186 Fed. 176.

⁵³ *Pennoyer v. Neff* (1877) 95 U. S. 714, 733, 24 L. ed. 565; *Scott v. McNeal* (1894) 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. ed. 896; *Old W. M. L. Assn. v. McDonough* (1907) 204 U. S. 2, 27 Sup. Ct. 236, 51 L. ed. 345. See also authorities cited in section 104, *infra*.

⁵⁴ *Hovey v. Elliott* (1897) 167 U. S. 409, 17 Sup. Ct. 841, 42 L. ed. 215; *Roller v. Holly* (1900) 176 U. S. 398, 20 Sup. Ct. 410, 44 L. ed. 520; and see *Londoner v. Denver* (1908) 210 U. S. 373, 28 Sup. Ct. 708, 52 L. ed. 1103. See also *Ochoa v. Hernandez y Morales* (1913) 230 U. S. 139, 33 Sup. Ct. 1033, 57 L. ed. 1427; *United States ex rel. Turner v. Fisher* (1911) 222 U. S. 204, 32 Sup. Ct. 37, 56 L. ed. 165; *Garfield v. Goldsby* (1908) 211 U. S. 249, 29 Sup. Ct. 62, 53 L. ed. 168; *Central of Ga. Ry. Co. v. Wright* (1907) 207 U. S. 127, 28 Sup. Ct. 47, 52 L. ed. 134; *Wetmore v. Karrick* (1907) 205 U. S. 141, 27 Sup. Ct. 434, 51 L. ed. 745. Compare *Moyer v. Peabody* (1909) 212 U. S. 78, 29 Sup. Ct. 235, 53 L. ed. 410; *Hammond P. Co. v. Arkansas* (1909) 212 U. S. 322, 349-351, 29 Sup. Ct. 370, 379, 380, 53 L. ed. 530; *Washington ex rel. Oregon R. & N. Co. v. Fairchild* (1912) 224 U. S. 510, 32 Sup. Ct. 535, 56 L. ed. 863; *American L. Co. v. Zeiss* (1911) 219 U. S. 47, 71, 31 Sup. Ct. 200, 209, 55 L. ed. 82; *North A. C. S. Co. v. Chicago* (1908) 211 U. S. 306, 29 Sup. Ct. 101, 53 L. ed. 195; *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 29 Sup. Ct. 50, 53 L. ed. 176; *Jacob v. Roberts* (1912) 223 U. S. 261, 265, 32 Sup. Ct. 303, 305, 56 L. ed. 429; *Longyear v. Toolan* (1908) 209 U. S. 414, 28 Sup. Ct. 506, 52 L. ed. 859; *Ballard v. Hunter* (1907) 204 U. S. 241, 262, 27 Sup. Ct. 261, 269, 51 L. ed. 461; *Felts v. Murphy* (1906) 201 U. S. 123, 26 Sup. Ct. 366, 50 L. ed. 689. "Even although the power of a state legislature to prescribe length of notice is not absolute, yet it is certain 'that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time:'" *Goodrich v. Ferris* (1909) 214 U. S. 71, 81, 29 Sup. Ct. 580, 583, 53 L. ed. 914, citing *Bellingham B. & B. C. R. Co. v. New Whatcom* (1899) 172 U. S. 314, 318, 19 Sup. Ct. 205, 206, 43 L. ed. 460.

tries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law.”⁵⁵ “The cases proceeded upon the theory that, given a court of justice which has jurisdiction, and acts, not arbitrarily, but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with.”⁵⁶

Provision regarded as a substantive restraint.

66. As we have already said, the court holds that the due process provision relates not only to procedure but also to substantive law. It declares that men possess rights to life, liberty and property of which, by virtue of the due process clauses, they may not be deprived improperly by any organ of state or federal government.⁵⁷

⁵⁵ *Twining v. New Jersey* (1908) 211 U. S. 78, 110, 111, 29 Sup. Ct. 14, 24, 53 L. ed. 97, citing a number of authorities in support of the statement. See also *Jordan v. Massachusetts* (1912) 225 U. S. 167, 32 Sup. Ct. 651, 56 L. ed. 1038; *Standard Oil Co. v. Missouri* (1912) 224 U. S. 270, 287, 32 Sup. Ct. 406, 411, 56 L. ed. 760; *American L. Co. v. Zeiss* (1911) 219 U. S. 47, 71, 31 Sup. Ct. 200, 209, 55 L. ed. 82; *Reetz v. Michigan* (1903) 188 U. S. 505, 508, 23 Sup. Ct. 390, 392, 47 L. ed. 563; *Ex parte Wall* (1883) 107 U. S. 265, 289, 2 Sup. Ct. 569, 589, 27 L. ed. 552.

⁵⁶ *Twining v. New Jersey* (1908) 211 U. S. 78, 111, 29 Sup. Ct. 14, 25, 53 L. ed. 97. The court then quotes from several opinions. See also *Bradley v. Richmond* (1913) 227 U. S. 477, 33 Sup. Ct. 318, 57 L. ed. 603, and editorial *The Menace of Law*, *The Independent*, Aug., 1912, 281. Compare *Interstate Com. Comn. v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 33 Sup. Ct. 185, 57 L. ed. 431.

⁵⁷ On the statement that the provision restricts all departments of government see sec. 74, *infra*; *Murray's Lessee v. Hoboken L. & I. Co.* (1855) 18 How. 272, 276, 15 L. ed. 372; *Chicago, B. & Q. R. Co. v. Chicago* (1897)

Its position is not merely that if there is any deprivation it must take place in a proper manner. The provision is not sufficiently complied with by a mere observance of formalities.⁵⁸ There must be a proper occasion for the

166 U. S. 226, 233, 234, 17 Sup. Ct. 581, 583, 41 L. ed. 979; *Hovey v. Elliott* (1897) 167 U. S. 409, 417, 17 Sup. Ct. 841, 844, 42 L. ed. 215; and also *Westervelt v. Gregg* (1854) 12 N. Y. 202, 212; *Bank of Columbia v. Okely* (1819) 4 Wheat. 235, 244, 4 L. ed. 559. Compare *Walker v. Sauvinet* (1875) 92 U. S. 90, 93, 23 L. ed. 678.

⁵⁸ See language used in *Long I. W. S. Co. v. Brooklyn* (1897) 166 U. S. 685, 695, 17 Sup. Ct. 718, 722, 41 L. ed. 1165; *Lochner v. New York* (1905) 198 U. S. 45, 56, 25 Sup. Ct. 539, 542, 49 L. ed. 937; *Fayerweather v. Ritch* (1904) 195 U. S. 276, 297, 298, 25 Sup. Ct. 58, 63, 64, 49 L. ed. 193; *Simon v. Craft* (1901) 182 U. S. 427, 436, 21 Sup. Ct. 836, 839, 45 L. ed. 1165; and also *King v. Hatfield* (1900) 130 Fed. 564, 582; *Scott v. City of Toledo* (1888) 36 Fed. 385, 393, 1 L. R. A. 688; decisions to the same effect in *Eubank v. Richmond* (1913) 226 U. S. 137, 33 Sup. Ct. 76, 57 L. ed. 156; *Washington ex rel. Oregon R. & N. Co. v. Fairchild* (1912) 224 U. S. 510, 32 Sup. Ct. 535, 56 L. ed. 863; *Choate v. Trapp* (1912) 224 U. S. 665, 32 Sup. Ct. 565, 56 L. ed. 941; *Missouri P. Ry. Co. v. Nebraska* (1910) 217 U. S. 196, 30 Sup. Ct. 461, 54 L. ed. 727; *Western U. T. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355; *Pullman Co. v. Kansas* (1910) 216 U. S. 56, 30 Sup. Ct. 232, 54 L. ed. 378; *Ludwig v. Western U. T. Co.* (1910) 216 U. S. 146, 30 Sup. Ct. 280, 54 L. ed. 423; *Selliger v. Kentucky* (1909) 213 U. S. 200, 29 Sup. Ct. 449, 53 L. ed. 761; *Louisville & N. R. Co. v. Central S. Y. Co.* (1909) 212 U. S. 132, 29 Sup. Ct. 246, 53 L. ed. 441; *Adair v. United States* (1908) 208 U. S. 161, 28 Sup. Ct. 277, 52 L. ed. 436; *Raymond v. Chicago U. T. Co.* (1907) 207 U. S. 20, 28 Sup. Ct. 7, 52 L. ed. 78; *Buck v. Beach* (1907) 206 U. S. 392, 27 Sup. Ct. 712, 51 L. ed. 1106; *Otis Co. v. Ludlow M. Co.* (1906) 201 U. S. 140, 26 Sup. Ct. 353, 50 L. ed. 696; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 26 Sup. Ct. 241, 50 L. ed. 596; *Lochner v. New York* (1905) 198 U. S. 45, 25 Sup. Ct. 539, 49 L. ed. 937; *Dobbins v. Los Angeles* (1904) 195 U. S. 223, 25 Sup. Ct. 18, 49 L. ed. 169; *Prout v. Starr* (1903) 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584; *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; *Green B. & M. C. Co. v. Patten P. Co.* (1898) 172 U. S. 58, 82, 19 Sup. Ct. 97, 106, 43 L. ed. 364 (1899) 173 U. S. 179, 19 Sup. Ct. 316, 43 L. ed. 658; *Alleyger v. Louisiana* (1897) 165 U. S. 578, 17 Sup. Ct. 427, 41 L. ed. 832; *Missouri P. Ry. Co. v. Nebraska* (1896) 164 U. S. 403, 17 Sup. Ct. 130, 41 L. ed. 489; *Kaukauna W. P. Co. v. Green B. & M. C. Co.* (1891) 142 U. S. 254, 269, 271, 12 Sup. Ct. 173, 176, 35 L. ed. 1004; *Railroad Comn. of Louisiana v. Cumberland T. & T. Co.* (1909) 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577; and cases cited in notes 19 to 23, supra. But

deprivation, of which a taking by way of punishment is one illustration, and if property is taken for public use there must, at least as a general rule, be just compensation. And the court holds that, with limitations asserted in some cases, the propriety of the taking is subject to judicial review.

No complete general statement as to restraint.

67. But beyond those points the extent of the restraint which the clauses are said to impose is not altogether definite. The court has not stated any clear general test of the existence of rights or the propriety of deprivations. It has not attempted to show the boundaries of the restraint by any definite and comprehensive statement.⁵⁹ It has, instead, been content to mark the scope of the provision by "the gradual process of judicial inclusion and exclusion,"⁶⁰ in which the decisions certainly do not

compare *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 157, 158, 17 Sup. Ct. 56, 62, 63, 41 L. ed. 369; *Missouri P. Ry. Co. v. Humes*, (1885) 115 U. S. 512, 520, 6 Sup. Ct. 110, 112, 29 L. ed. 463; *Walker v. Sauvinet* (1875) 92 U. S. 90, 93, 23 L. ed. 678; concurring opinion in *Taylor and Marshall v. Beckham* (1900) 178 U. S. 548, 585, 20 Sup. Ct. 890, 1009, 903, 904, 44 L. ed. 1187.

⁵⁹ See *Ballard v. Hunter* (1907) 204 U. S. 241, 255, 27 Sup. Ct. 261, 266, 51 L. ed. 461; *Holden v. Hardy* (1898) 169 U. S. 366, 389, 18 Sup. Ct. 383, 387, 42 L. ed. 780; *Eubank v. Richmond* (1912) 226 U. S. 137, 143, 33 Sup. Ct. 76, 77, 57 L. ed. 156; *Twining v. New Jersey* (1908) 211 U. S. 78, 101, 29 Sup. Ct. 14, 20, 53 L. ed. 97; *Orient Ins. Co. v. Daggs* (1899) 172 U. S. 557, 563, 19 Sup. Ct. 281, 283, 43 L. ed. 552; *Missouri P. Ry. Co. v. Humes* (1885) 115 U. S. 512, 519, 6 Sup. Ct. 110, 112, 29 L. ed. 463.

⁶⁰ *Davidson v. New Orleans* (1877) 96 U. S. 97, 104, 24 L. ed. 616; *Hagar v. Reclamation Dist.* (1884) 111 U. S. 701, 707, 4 Sup. Ct. 663, 667, 28 L. ed. 569. See also *Twining v. New Jersey* (1908) 211 U. S. 78, 100, 29 Sup. Ct. 14, 20, 53 L. ed. 97; *Missouri P. Ry. Co. v. Humes* (1885) 115 U. S. 512, 519, 6 Sup. Ct. 110, 112, 29 L. ed. 463; *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 110, 112, 31 Sup. Ct. 186, 188, 55 L. ed. 112; *Hudson C. W. Co. v. McCarter* (1908) 209 U. S. 349, 355, 28 Sup. Ct. 629, 531, 52 L. ed. 828; *Freeland v. Williams* (1889) 131 U. S. 405, 418, 9 Sup. Ct. 763, 767, 33 L. ed. 193; *Johnson v. United States* (1913)

show a thoroughly uniform tendency.⁶¹ And while it is possible to classify most of the decisions which have been based upon the provision and to state some definite rules, it is not yet possible to unify the several lines of decision and to draw from them a clear and complete statement of the general extent of the restraint.⁶²

228 U. S. 457, 458, 33 Sup. Ct. 572, 57 L. ed. 919; *St. Louis, I. M. & S. Ry. Co. v. Davis* (1904) 132 Fed. 629, 633; *Saxton Nat. Bank v. Carswell* (1895) 126 Mo. 436, 442, 29 S. W. 279, 280; *Mayor v. Scharf* (1890) 54 Md. 499, 517; note 62, *infra*.

⁶¹ Observe the conflict in decisions in cases cited in note 43, *supra*; in section 68, *infra*; and in secs. 92-106, *infra*. See also, for example, the different tendencies shown in *Bacon v. Walker* (1907) 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499; *McLean v. Arkansas* (1909) 211 U. S. 539, 29 Sup. Ct. 206, 53 L. ed. 315; *Heath & Milligan Mfg. Co. v. Worst* (1907) 207 U. S. 338, 357, 28 Sup. Ct. 114, 120, 52 L. ed. 236, where statutes were upheld; in *Lochner v. New York* (1905) 198 U. S. 45, 25 Sup. Ct. 539, 49 L. ed. 937, where, as Holmes, J., suggested, dissenting (198 U. S. 75, 25 Sup. Ct. 546, 49 L. ed. 949), the court seemed to regard the Fourteenth Amendment as an enactment of Herbert Spencer's Social Statics; and in the dissenting opinion of Brewer, J., in *Budd v. New York* (1892) 143 U. S. 517, 551, 12 Sup. Ct. 468, 478, 36 L. ed. 247. "In the line of decisions under the Fourteenth Amendment uncertainty has been the rule:" Collins, *The Fourteenth Amendment and the States*, 119. See also *ibid.* 117, 118, 120-124. That author discusses the question, especially comparing the decisions and the opinions in *Gulf, C. & S. F. Ry. Co. v. Ellis* (1897) 165 U. S. 150, 17 Sup. Ct. 255, 41 L. ed. 666, and *Atchison, T. & S. F. R. Co. v. Matthews* (1899) 174 U. S. 96, 19 Sup. Ct. 609, 43 L. ed. 909, saying (p. 124), "Each side—not of the attorneys—but of the members of the Supreme Court itself, cited numerous precedents. If precedents could establish the law under the Amendment, both sides were right in each case." And see note 73, *infra*.

⁶² "Cases under the Amendment began coming before that tribunal as early as 1873, but the court thought it wiser to leave the definition of the scope and the meaning of its terms to the operation of the doctrine of stare decisis rather than to attempt a definition of the whole provision outright. Thus by the gradual process of judicial inclusion and exclusion it was intended that there should be accumulated in the course of time a long line of judicial precedents based on concrete cases presented for decision, which would in themselves define the terms of the Amendment. . . . From the adoption of the Amendment in 1868 to the close of the 1910-1911 Term of the Supreme Court, six hundred and four opinions have been delivered under section one of that article. We have now a line of decisions run-

Particular lines of decision.

68. The court has said broadly that the clauses forbid the deprivation of the substance of individual rights to life, liberty or property by any organ of government by any method whatever.⁶³ But in almost all of the cases which have arisen under the due process clauses the court has given to those clauses other interpretations, not avowedly, at least, by way of elaboration or illustration of that indefinite statement but independently. Thus it has said that the clauses prohibit the taking of private property for public use without just compensation,⁶⁴ and, therefore, prohibit the limiting of the charges of railroad companies to an improper extent.⁶⁵ It has also said in other cases that the clauses forbid the enforcement of unreasonable regulations,⁶⁶ a regulation of railroad charges being unreasonable if it does not yield a sufficient rate of re-

turning back for forty-one years. Has the doctrine of *stare decisis* effected a definition of the Amendment? Is its sphere of operation now known? These questions must be answered in the negative. After forty years from the date of the adoption of the Amendment, Mr. Justice Moody, in delivering the opinion of the court in a recent case, could say: 'The Fourteenth Amendment withdrew from the states powers theretofore enjoyed by them, to an extent not yet fully ascertained.' (*Twining v. New Jersey* (1908) 211 U. S. 78, 92, 29 Sup. Ct. 14, 16, 17, 53 L. ed. 97.) In a still more recent case, after five hundred and sixty-seven cases involving an interpretation of the 'due process of law' clause under the Amendment had been considered by the court, Mr. Justice Holmes, in delivering the opinion, said, 'What is due process of law depends on the circumstances.' (*Moyer v. Peabody* (1909) 212 U. S. 78, 84, 29 Sup. Ct. 235, 236, 53 L. ed. 410.) We have made but little progress in reaching even a working definition of section one of the Fourteenth Amendment under the principle of *stare decisis*." Collins, *The Fourteenth Amendment and the States*, 112, 113, 114. "That clause is already a catch-all, overflowing with misplaced principles." Wigmore, *Evidence*, p. 3102, note. See also notes 14, *supra*, and 73, *infra*.

⁶³ See sec. 72, *infra*.

⁶⁴ See sec. 119, *infra*.

⁶⁵ See notes 150, 165 in Chapter 4, *infra*.

⁶⁶ See sec. 105, *infra*.

turn to the carrier,⁶⁷ or, apparently, if the court considers it unjustifiable for any other reason.⁶⁸ And, in cases in which railroad charges were not involved, the court has condemned regulations upon the ground that they were discriminatory;⁶⁹ it has spoken of acts beyond the scope of governmental authority;⁷⁰ and, while it does not inquire whether legislators were influenced by improper motives,⁷¹ it has said that administrative decisions were final because fraud was not proved.⁷²

Therefore, instead of making a definite statement as to the general scope of the provision, it has been necessary for us to state a rather vague general proposition and then call attention to several narrower lines of decision which, unless with rare exceptions, have not avowedly been made by way of elaboration or illustration of any one underlying principle which is common to all the cases.⁷³

⁶⁷ See note 165 in Chapter 4, *infra*.

⁶⁸ *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858.

⁶⁹ See sec. 89, *infra*.

⁷⁰ See sec. 104, *infra*.

⁷¹ See sec. 90, *infra*.

⁷² See sec. 90, *infra*.

⁷³ See notes 14, 62, *supra*. "The modern concept of due process of law is not a legal concept at all; it comprises nothing more or less than a roving commission to judges to sink whatever legislative craft may appear to them to be, from the standpoint of vested interests, of a piratical tendency:" E. A. Corwin, book review in 6 *Am. Pol. Sci. Rev.* 271. "We have very effectually disposed of the last safeguard against the establishment of a judicial veto upon any and all acts of our legislative assemblies by discarding the rule that the courts must limit their inquiry to the question of the existence of the power which the legislature has undertaken to exercise, and that where the power exists its exercise is beyond the judicial sphere of influence. The courts now openly review the use made by the legislature of its conceded powers, thus arrogating to themselves a distinctly legislative function. The result of all these changes may be summed up in a sentence. There are now no such 'plain and simple' rules of interpretation as Judge Lurton claims; on the contrary, there are now practically no rules at all. Each case is supposed to stand 'on its own merits,' which, translated into

Detailed application of rules.

69. The application of the rules which have been set forth in this chapter to questions of procedure have already been stated with sufficient fulness. The detailed application of the rules of substantive law so far as they relate to rate regulation will be considered at greater length in a subsequent chapter.⁷⁴

Different tests of constitutionality.

70. In the cases which we have noted the court has considered the effect of the governmental action or its propriety.⁷⁵ But the court does not always give weight to such considerations. In other cases it has said that questions of power do not depend upon the extent to which it may be exercised.⁷⁶ And it has often held that an erron-

ordinary English, simply means that each law is declared 'constitutional' or 'unconstitutional' according to the opinion the judges entertain as to its wisdom. This is another reason for the fact that almost all important constitutional cases are now decided by divided courts. Since there are no longer any set rules by which the judges can be guided, since they are left to determine the propriety or wisdom of laws according to the canons of politics and statesmanship, they naturally exhibit those differences of opinion which we expect to find in legislative bodies. This leads our Supreme Court as well as our other courts into the position—anomalous and absurd for a court, though perfectly proper for a legislature—of deciding in different ways cases similar in principle:" Boudin, *Government by Judiciary*, 26 *Pol. Sci. Quar.* 238, 267. Compare note 116 in Chapter 4, *infra*.

⁷⁴ Chapter 6, *infra*.

⁷⁵ See also *St. Louis, I. M. & S. Ry. Co. v. Wynne* (1912) 224 U. S. 354, 32 Sup. Ct. 493, 56 L. ed. 799. Compare *Chin Yow v. United States* (1908) 208 U. S. 8, 28 Sup. Ct. 201, 52 L. ed. 369, an immigration case, in which the court said that "unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong." And compare note 61, *supra*; note 64 in Chapter 4, *infra*.

⁷⁶ *Brown v. Maryland* (1827) 12 Wheat. 419, 439, 6 L. ed. 678; *McCray v. United States* (1904) 195 U. S. 27, 56, 24 Sup. Ct. 769, 776, 49 L. ed. 78, and cases there cited; *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107,

eous judicial action does not for that reason violate the due process provision,⁷⁷ and it has so decided even in

153, 154, 158, 31 Sup. Ct. 342, 350, 352, 55 L. ed. 389; *Missouri P. Ry. Co. v. Kansas* (1910) 216 U. S. 262, 282, 30 Sup. Ct. 330, 337, 54 L. ed. 472; *Munn v. Illinois* (1876) 94 U. S. 113, 134, 24 L. ed. 77; *Sweet v. Rechel* (1895) 159 U. S. 380, 393, 16 Sup. Ct. 43, 46, 40 L. ed. 188; *United States v. Delaware & H. Co.* (1909) 213 U. S. 366, 405, 29 Sup. Ct. 527, 535, 53 L. ed. 836; *Moyer v. Peabody* (1909) 212 U. S. 78, 29 Sup. Ct. 235, 53 L. ed. 410. See also *Appleby v. Buffalo* (1911) 221 U. S. 524, 31 Sup. Ct. 699, 55 L. ed. 838; *McGovern v. City of New York* (1913) 229 U. S. 363, 371, 33 Sup. Ct. 876, 877, 57 L. ed. 1228. Compare *St. Louis, I. M. & S. Ry. Co. v. Wynne* (1912) 224 U. S. 354, 32 Sup. Ct. 493, 56 L. ed. 799; *Atlantic C. L. R. Co. v. North Carolina Corp. Comm.* (1907) 206 U. S. 1, 20, 27 Sup. Ct. 585, 592, 51 L. ed. 933; *McCray v. United States* (1904) 195 U. S. 27, 56, 59-61, 64, 24 Sup. Ct. 769, 776, 778, 780, 49 L. ed. 78; and also *Waters-Pierce O. Co. v. Texas* (1909) 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed. 417; *Corwin, Due Process of Law Before the Civil War*, 24 *Harv. L. Rev.* at 469; *Corwin, The Supreme Court and the Fourteenth Amendment*, 7 *Mich. L. Rev.* at 670; note 73, *supra*.

⁷⁷ *Arrowsmith v. Harmoning* (1886) 118 U. S. 194, 6 Sup. Ct. 1023, 30 L. ed. 243; *In re Converse* (1891) 137 U. S. 624, 11 Sup. Ct. 191, 34 L. ed. 796; *Patterson v. Colorado* (1907) 205 U. S. 454, 461, 27 Sup. Ct. 556, 557, 51 L. ed. 879; *McGovern v. City of New York* (1913) 229 U. S. 363, 371, 33 Sup. Ct. 876, 877, 57 L. ed. 1228; *Bonner v. Gorman* (1909) 213 U. S. 86, 91, 29 Sup. Ct. 483, 484, 53 L. ed. 709; *Sauer v. City of New York* (1907) 206 U. S. 536, 543, 545, 27 Sup. Ct. 683, 688, 689, 51 L. ed. 1176; *Ballard v. Hunter* (1907) 204 U. S. 241, 258, 27 Sup. Ct. 261, 267, 41 L. ed. 461; *Howard v. Kentucky* (1906) 200 U. S. 164, 26 Sup. Ct. 189, 50 L. ed. 421; *Rogers v. Peck* (1905) 199 U. S. 425, 26 Sup. Ct. 87, 50 L. ed. 256; *Backus v. Fort S. U. D. Co.* (1898) 169 U. S. 557, 576, 18 Sup. Ct. 445, 452, 42 L. ed. 853; *Central L. Co. v. Laidley* (1895) 159 U. S. 103, 16 Sup. Ct. 80, 40 L. ed. 91; *Bergemann v. Backer* (1895) 157 U. S. 655, 15 Sup. Ct. 727, 39 L. ed. 845; *Baltimore T. Co. v. Baltimore B. R. Co.* (1894) 151 U. S. 137, 14 Sup. Ct. 294, 38 L. ed. 102; *Lent v. Tillson* (1891) 140 U. S. 316, 331, 11 Sup. Ct. 825, 831, 35 L. ed. 419; *Marrow v. Brinkley* (1889) 129 U. S. 178, 9 Sup. Ct. 267, 32 L. ed. 954. See also *Chin Yow v. United States* (1908) 208 U. S. 8, 28 Sup. Ct. 201, 52 L. ed. 369; *In re Manning* (1891) 139 U. S. 504, 11 Sup. Ct. 624, 35 L. ed. 264; *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 157, 168, 17 Sup. Ct. 56, 62, 66, 67, 41 L. ed. 369; *Lambert v. Barrett* (1895) 157 U. S. 697, 15 Sup. Ct. 722, 39 L. ed. 865; *Fidelity & C. Co. v. Southern Ry. N. Co.* (1909) 214 U. S. 498, 29 Sup. Ct. 699, 53 L. ed. 1060; *Delmar Jockey Club v. Missouri* (1908) 210 U. S. 324, 335, 28 Sup. Ct. 732, 735, 62 L. ed. 1080; *Metropolis T. Co. v. Chicago* (1913) 228 U. S. 61, 70, 33 Sup. Ct. 441, 443, 57 L. ed. 730. But compare *St. Louis, I. M. & S. Ry. Co. v. Taylor* (1908) 210 U. S. 281, 292, 28 Sup. Ct.

cases in which sentences of capital punishment have been pronounced.

We shall not, however, attempt in the present chapter to reconcile these several lines of decision. A discussion of the purpose of those who placed the due process clauses in the Federal Constitution will require a separate chapter.⁷⁸

616, 620, 52 L. ed. 1080; *Green B. & M. C. Co. v. Patten P. Co.* (1898) 172 U. S. 58, 82, 19 Sup. Ct. 97, 106, 43 L. ed. 364 (1899) 173 U. S. 179, 19 Sup. Ct. 316, 43 L. ed. 658; *American Ex. Co. v. Mullins* (1909) 212 U. S. 311, 29 Sup. Ct. 381, 53 L. ed. 525.

⁷⁸ Chapter 4, *infra*.

CHAPTER IV.

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INTRODUCTORY.

Scope of chapter.

71. We have already noted that the United States Supreme Court has not stated any clear general test of the compliance of governmental action with the requirement of the due process provision. We must now add that the court has not shown sufficiently the grounds for the decisions which it has rendered under that provision. It has given a number of reasons for its decisions, but it has not, unless in exceptional cases, shown how those reasons were derived from the provision which the court was called upon to interpret. In many cases it has not even attempted to show by what process of reasoning its decisions were derived from the terms of the due process clauses. In other cases it has not shown sufficiently the connection between its conclusions and the words of the Constitution upon which any conclusions must be based. And if the court has at any time shown clearly that the decisions were based upon a careful interpretation of the due process clauses, it certainly has not, by reference or otherwise, given to that demonstration the prominence which it deserved.

Indeed, the reasons which the court has given for some of its decisions under the due process clauses are not consistent with reasons which the court has given for its decisions in other cases. We must, then, examine the fundamental reasons for its decisions, in order to reconcile the cases if that can be done, or, if it cannot be done, in order to determine which line of decisions rests upon correct principles.¹ For even if we do not go so far as the court

¹ "We must, then, either reconcile the cases, or, if this cannot be done, determine which line rests upon the right principle; and having so determined, overrule or qualify the others, and apply and enforce the correct doctrine. This is the case, since to do otherwise would serve only to add

itself has gone and say that the increasing frequency with which the clauses are invoked furnishes abundant evidence that there exists some strange misconception of the scope of the provision,² we must at least realize that in view of the state of the authorities it will be necessary for us to do more than simply compile the results of the gradual process of judicial inclusion and exclusion.

We shall, therefore, consider whatever reasons the court has given for declaring that the clauses established particular principles; we shall examine other lines of thought which, though not expressed so definitely, seem to have influenced the decisions; and we shall inquire whether further reasons may properly be urged in support of or in opposition to those decisions. By so doing we shall obtain a clearer, more correct and more complete view of the general purpose of those who placed the due process clauses in the Federal Constitution than we could secure in any other manner. Such a discussion will necessarily be somewhat long. But the importance of the subject and the state of the authorities furnish an ample warrant for an extensive examination of fundamental principles.

IS THE PROVISION NECESSARILY A SUBSTANTIVE RESTRAINT?

Position taken in *Hurtado v. California*.

72. The clearest reasoning in support of the position of the court that the due process clauses concern more than

to the seeming confusion and increase the uncertainty in the future as to a question which it is our plain duty to make free from uncertainty." *Ex parte Harding* (1911) 219 U. S. 363, 378, 31 Sup. Ct. 324, 329, 55 L. ed. 252. While this case does not turn upon the due process provision, the language quoted is pertinent.

² See p. 119, *supra*.

procedure³ seems to have been advanced in the opinion in *Hurtado v. California*,⁴ in which the court admitted that in England the legislative department of government was not in any respect whatever restricted by the constitutional provision, which the court has declared to be closely akin to the due process requirement,⁵ that no one should suffer named deprivations except in accordance with the law of the land. The court said that, although the provisions of Magna Carta were directed against the king and acts of Parliament were always regarded as consistent with the law of the land, yet in this country the provisions in our Bills of Rights are limitations upon all departments of government, and for that reason provisions taken from the English constitution have a broader meaning than they had in England and must be held to guarantee not particular forms of procedure but the very substance of individual rights to life, liberty and property.⁶

³ See sec. 66, *supra*.

⁴ (1884) 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. ed. 232.

⁵ See cases in note 18, *infra*.

⁶ "The concessions of Magna Carta were wrung from the king as guarantees against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the law of the land; for notwithstanding what was attributed to Lord Coke in *Bonham's Case* (1609) 8 Coke, 114a, 118a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons. In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Carta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial. It necessarily happened, therefore, that as these broad and general maxims

We are not at present interested in the actual decision in that case, for the statute under consideration, which was sustained, dealt only with a question of procedure. But the opinion is important because it contains what is apparently the clearest reasoning which has been advanced by the court in support of its position. The court practically assumed that all of the provisions in our Bills of Rights apply to all organs of government and said that for that reason the provision must relate to more than procedure.

Are all organs of government necessarily restrained?

73. In saying that the provisions of our constitutions apply to all organs of government the court was probably influenced by the fact that our Bills of Rights do contain

of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty and property." *Hurtado v. California* (1884) 110 U. S. 516, 531, 532, 4 Sup. Ct. 111, 292, 119, 28 L. ed. 232. See also 110 U. S. at 535-537, 4 Sup. Ct. at 120, 121; *Davidson v. New Orleans* (1877) 96 U. S. 97, 102, 24 L. ed. 616; and concurring opinion in the latter case. Compare 96 U. S. at 103, 104, 24 L. ed. at 619. The court in the *Hurtado* case added, "Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and while in every instance laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, 'may alter the mode and application but have no power over the substance of original justice.'"

some provisions which restrict our legislative bodies. Yet obviously it does not follow therefrom that all of the provisions restrain our legislatures. The fact that a constitution restrains each of the departments of government no more makes every restraint which that constitution places upon one department binding upon the rest than the fact that the Federal Constitution restrains the federal government and restrains the states makes every restraint which that Constitution places upon the one binding upon the other.

And certainly it is not self-evident that every restraint set forth in our constitutions is necessarily directed against every department of government, especially where the provision is not unlimited in its terms. The requirement that no taxes shall be levied except in accordance with a law which originated in the House of Representatives does not constitute any restraint upon the House of Representatives. And so also if when the due process provision was placed in the Federal Constitution it meant that no person should be deprived of life, liberty or property except in the manner prescribed by the law of the jurisdiction, the court cannot properly say that the provision restricts a department of government which was authorized to change procedure in making such changes, and that if the original meaning of the term "due process of law" does not fit in with the assumption that all portions of the Constitution apply to all departments of government the meaning of the term must be changed rather than the assumption that the provision restrains all departments of government.

We shall not pause here to consider the actual meaning of the term "due process of law." It is sufficient for our present purpose to point out that the court is not warranted in slurring over the particular provisions without

careful examination and assuming that all of the provisions in our Bills of Rights necessarily restrain all departments of government and that the meanings of the provisions must be such as will correspond with this assumption.

It will be observed that the court did not merely say that a provision of the Constitution restricts all departments of government to which, regardless of its original application, it might be applied without changing its original meaning. The court went further than that: it went further than it would have gone if it had said, for instance, that, while in England a provision in the constitution for trial by jury would not have been a restraint upon legislative regulation of judicial procedure, in this country such a provision would limit the activity of the legislature in that respect; for, regardless of the effect of such a provision in the mother country, there is nothing in the nature or terms or history of that provision which would make it inapplicable as a restraint upon legislation. But the court has gone even further than the assumption that our legislatures are restrained by all of the provisions of the constitutions which, regardless of their original applications, might be treated as restraints upon legislation without changing their original meanings, and has practically assumed that all of the provisions in our Bills of Rights necessarily restrain all of the departments of government. And such an assumption, it is submitted, is not justifiable.

The significance of the word "state."

74. In interpreting the due process clause of the Fourteenth Amendment, the court in some cases has laid stress upon the fact that the requirement is that no "state"

shall deprive without due process of law, and has said that the word "state" must necessarily cover all organs of state government.⁷

Those who adopted the Fourteenth Amendment, by the language which they used, showed unquestionably that they intended to provide that organs of the state governments should be bound by the due process requirement which had theretofore bound only organs of the federal government, and that if an organ of the federal government was bound by the due process clause of the Fifth Amendment the similar organ of state government should be bound by the provision of the Fourteenth Amendment. Yet it is not clear that they intended that their use of the word "state" should have any greater significance than this.⁸

Of course, if the due process clause had been the only provision which was placed in the Constitution in Reconstruction times, it might possibly be said that to decide that any organ of state government was not restrained by it would be to make that sole protection for the freedmen so inadequate that it could hardly be supposed that those who amended the Constitution in those stirring times intended that the provision should have simply that restraining force. But that is not the situation. The due process clause is only one out of a number of provisions which were placed in the Constitution at the same per-

⁷ *Ex parte Virginia* (1879) 100 U. S. 339, 347, 25 L. ed. 676; *Neal v. Delaware* (1880) 103 U. S. 370, 397, 26 L. ed. 567; *Chicago B. & Q. R. Co. v. Chicago* (1897) 166 U. S. 226, 233, 234, 17 Sup. Ct. 581, 583, 41 L. ed. 979; and see *Lochner v. New York* (1905) 198 U. S. 45, 56, 25 Sup. Ct. 539, 542, 49 L. ed. 937; *Davidson v. New Orleans* (1877) 96 U. S. 97, 102, 24 L. ed. 616; dissenting opinion in *Taylor and Marshall v. Beckham* (1900) 178 U. S. 548, 599, 600, 20 Sup. Ct. 904, 1014, 44 L. ed. 1187; sec. 58, *supra*.

⁸ See note 8 in Chapter 3, *supra*.

iod.^{8a} For example, slavery was forbidden and legislation against the freedmen was prevented in large measure by provisions concerning the suffrage and representation. And so there is no such reason as that which has just been suggested for saying that the due process clause must be regarded as a restraint upon all organs of government.

Still less can any one go on to claim that any particular clause of the Amendments must, of necessity, have been so framed as to meet every emergency; for that claim could not be made even for the Reconstruction Amendments as a whole. Nor is there anything in the contention that unless all organs of government are restrained the provision is useless.⁹ By the Federal Constitution the federal government is prevented from doing some things which a state government may do, and vice versa. It is not said that because a provision applies to only one government it does not amount to any restraint whatever; and so also it cannot be said that if a provision applies to only one department of government it has no restraining force.¹⁰ And it certainly cannot be contended that a provision must have as extensive an effect as those who interpret it may consider desirable.

Is the restraint necessarily more than procedural?

75. Yet even if it were clearly shown that the due process provision constituted an independent restriction upon legislative regulation of procedure, it certainly would not follow that the provision related also to substantive law. The Amendments concerning jury trials limit the power

^{8a} See 7 Mich. L. Rev. at 644 and note.

⁹ See cases in note 7, *supra*.

¹⁰ The weakness of the contention is also shown by a consideration of the language of the Constitution of Massachusetts, Part I, Articles 10 and 30. And see 24 Harv. L. Rev. at 369, 372.

of Congress over judicial procedure; but no one would think of contending that those provisions deal with anything except jury trials; and in the argument in the opinion in the *Hurtado* case¹¹ the court does not show any stronger reason for saying that the due process clauses must relate to more than procedure.

Of course, our constitutions do in places deal with substantive law. The provisions relating to religious freedom and the provisions relating to slavery are instances of such provisions. But it is also clear beyond dispute that those who adopted our constitutions at other times sought to secure good government indirectly, and only indirectly, by provisions concerning governmental methods. The men who adopted the Fifth Amendment were men who placed a large amount of dependence upon forms and institutions.¹² They relied largely upon what they con-

¹¹ See sec. 72, *supra*.

¹² Sir Frederick Pollock speaks of "the very common error, especially prevalent in the eighteenth century, of attributing a constant and infallible efficacy to the forms of government:" Pollock's *Maine's Ancient Law*, 175. Professor Thayer says, "The chief protections were a wide suffrage, short terms of office, a double legislative chamber, and the so-called executive veto. There was, in general, the greatest unwillingness to give the judiciary any share in the law-making power." "The judiciary may well reflect that if they had been regarded by the people as the chief protection against legislative violation of the constitution, they would not have been allowed merely this incidental and postponed control. . . . It was, then, all along true, and it was foreseen, that much which is harmful and unconstitutional may take effect without any capacity in the courts to prevent it, since their whole power is a judicial one. Their interference was but one of many safeguards, and its scope was narrow:" *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 137, note, 136, 137; Thayer, *Legal Essays*, 11, note, 11, 12. Chief Justice Marshall says, "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments:" *Gibbons v. Ogden* (1824) 9 Wheat. 1, 197, 6 L. ed. 23. See also *Oceanic N. Co. v. Stranahan*

sidered an appropriate distribution and separation of the powers of government, upon popular representation in the legislature, and upon trial by jury. In conformity with these views they were unwilling that the judiciary should pass upon the desirability of legislation;¹³ and they were so well satisfied with trial by jury that by the Seventh Amendment, which was adopted at the same time as the Fifth Amendment, they were careful to provide that no appellate federal tribunal should consider whether the verdict of a jury in a trial at common law were against the weight of the evidence.¹⁴ Moreover, in the Reconstruction Amendments provisions concerning elections and office-holding take up fully one-half of the space and show that when that portion of the Constitution was adopted a large amount of reliance was placed upon the organization of the state governments for the securing of fair treatment to the freedmen.

In short, it is clear that those who adopted the first ten Amendments and those who adopted the Reconstruction Amendments believed that by providing carefully as to the agencies of government they were doing much towards securing good government. Such provisions cannot by any flight of the imagination be con-

(1909) 214 U. S. 320, 340, 29 Sup. Ct. 671, 676, 53 L. ed. 1013; *Twining v. New Jersey* (1908) 211 U. S. 78, 106, 114, 29 Sup. Ct. 14, 22, 26, 53 L. ed. 97; *McCray v. United States* (1904) 195 U. S. 27, 55, 24 Sup. Ct. 769, 776, 49 L. ed. 78; *Lottery Case—Champion v. Ames* (1903) 188 U. S. 321, 363, 23 Sup. Ct. 321, 329, 330, 47 L. ed. 492; *Missouri, K. & T. Ry. Co. v. May* (1904) 194 U. S. 267, 270, 24 Sup. Ct. 638, 639, 48 L. ed. 971; *County of Mobile v. Kimball* (1880) 102 U. S. 691, 704, 26 L. ed. 238; *Martin v. Mott* (1827) 12 Wheat. 19, 32, 6 L. ed. 537; *Dorman v. State* (1859) 34 Ala. 216, 235; Kent, *Commentaries*, II, *11; 9 Mich. L. Rev. 108, 109; Pollock's *Maine's Ancient Law*, xvii.

¹³ Elliot's *Debates*, V, 151, 155, 164, 166, 344, 428; notes 12, *supra*, and 81, *infra*; and see *McMurtrie, The Jurisdiction to Declare Void Acts of Legislation*, 32 Am. L. Reg. N. S. 1094, 1100, 1103.

¹⁴ See authorities cited in notes 45, 46 in Chap. 9, *infra*.

strued as relating directly to substantive law; and there are other provisions of the United States Constitution which are unquestionably strictly procedural. Therefore, we cannot say that a clause of the Constitution necessarily "must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty and property,"¹⁵ but we must, instead, inquire as to the particular clause whether it has in fact that effect.

THE LAW OF THE LAND.

"Due process" and "law of the land" provisions are akin.

76. As already pointed out,¹⁶ the court has said that the due process provision is akin to the provision in chapter 39 of Magna Carta¹⁷ that "no freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." In some cases it has said that the provision in the American Constitution is equivalent to the one in Magna Carta,¹⁸ and in other cases

¹⁵ See *Hurtado v. California*, quoted in note 6, *supra*.

¹⁶ Sec. 72, *supra*.

¹⁷ The language quoted in the text is from the Magna Carta of 1215. On the translation see McKechnie, *Magna Carta*, 436, 442. Coke and others have followed the phraseology of the reissue of the Charter by Henry III in 1225, where the wording is somewhat different and where different chapter-numbers prevail. See McKechnie, *op. cit.*, 183. While the printed texts of Magna Carta are divided into numbered chapters, such an arrangement is simply a modern invention made for convenience of reference. The original is not divided into chapters: McKechnie, *op. cit.*, 200.

¹⁸ *Twining v. New Jersey* (1908) 211 U. S. 78, 100, 105, 108, 29 Sup. Ct. 14, 20, 22, 23, 53 L. ed. 97; *Missouri P. Ry. Co. v. Humes* (1885) 115 U. S. 512, 519, 6 Sup. Ct. 110, 112, 29 L. ed. 463; *Murray's Lessee v. Hoboken*

it has said that while the clauses are akin the due process requirement must be given a more comprehensive interpretation in this country than that to which the requirement of Magna Carta would have been entitled in England.¹⁹ Both of these positions will be considered.

The "law of the land" in England.

77. When the provision for the law of the land was used in Magna Carta it referred largely if not exclusively to procedure;²⁰ indeed, it seems that in the chapter under consideration it must have referred to procedure exclusively. As Dr. Bigelow says, "The expression 'per legem

L. & I. Co. (1855) 18 How. 272, 276, 15 L. ed. 372; and see *Walker v. Sauvinet* (1875) 92 U. S. 90, 93, 23 L. ed. 678; *Davidson v. New Orleans* (1877) 96 U. S. 97, 101, 102, 24 L. ed. 616; *Hurtado v. California* (1884) 110 U. S. 516, 535, 4 Sup. Ct. 111, 292, 120, 28 L. ed. 232; *In re Kemmler* (1890) 136 U. S. 436, 448, 10 Sup. Ct. 930, 934, 34 L. ed. 519; *French v. Barber A. P. Co.* (1901) 181 U. S. 324, 333, 21 Sup. Ct. 625, 628, 45 L. ed. 879; *Dent v. West Virginia* (1889) 129 U. S. 114, 123, 124, 9 Sup. Ct. 231, 234, 32 L. ed. 623; 7 Harv. L. Rev. at 474.

¹⁹ See note 6, *supra*.

²⁰ This procedure is dealt with by Thayer, *Preliminary Treatise on Evidence*, 198, and McKechnie, *Magna Carta*, circ. 102. The latter says that in those days the chief or medial judgment "came before the proof or trial, not after it. It consisted indeed in decreeing whether or not, on the strength of the previous procedure, the defendant should be put to his proof at all; and if so, what 'proof' should be demanded. Now, the exact test to be appointed by the court varied somewhat, according to circumstances, but long-established custom had laid down with some exactitude a rule applicable to every case likely to occur; and, further, the possible modes of proof were limited to four or five at the outside. . . . The 'proof,' of whatever kind it might be, thus appointed by the 'judges' for the defendant's performance was technically known as a 'law' (Latin *lex*) in the sense of a 'test' or 'trial' or 'task', according to his success or failure in which his case should stand or fall. . . . The ancient 'trial' was merely a formal test, which was, except in the case of battle, entirely one-sided." It consisted simply in the performance by the party of the test which had been set for him. Those who gave final sentence were mere umpires. They "could scarcely be said to decide the case, since this had already been practically decided by the success or failure of the party on whom the proof had been laid."

terrae' simply required judicial proceedings according to the nature of the case; the duel, ordeal or compurgation in criminal cases, the duel, witnesses, charters or recognition in property cases."²¹ And there are other authorities to the same effect.²² It is possible that the provision for the law of the land referred merely to the particular forms of procedure which were lawful in the year 1215, but there is room for doubt whether it sought to make it impossible to change those forms of procedure.²³

²¹ Bigelow, *History of Procedure in England*, 155, note.

²² See Thayer, *Preliminary Treatise on Evidence*, 199-201; Baldwin, *The Courts as Conservators of Social Justice*, 9 Col. L. Rev. 567, 571. In McKechnie, *Magna Carta*, 437, 441, 442, it is said that *Magna Carta* "sought the reform of a specific and clearly defined group of abuses. Its main object was to prohibit John from resorting to what is sometimes whimsically known in Scotland as 'Jeddart justice.' It forbade him for the future to place execution before judgment. . . . The Great Charter promised that no plea, civil or criminal, should henceforth be decided against any freeman until he had failed in the customary 'proof'—whether battle, or ordeal, or otherwise. . . . The words of John's charter promised a threefold security to all the freemen of England. Their persons and property were protected from the king's arbitrary will by the rule that execution should be preceded by a judgment—by a judgment of peers—by a judgment according to the appropriate time-honored 'test,' battle, compurgation, or ordeal." In Reeves, *History of the English Law* (in Finlason's ed., II, 43) "*per legem terrae*" is rendered "by some other legal process or proceeding adapted by law to the nature of the case."

²³ McKechnie says, "The stress placed on the accused's right to the time-honored forms of *lex* is well illustrated by the difficulty of substituting jury trial for ordeal. . . . The right of 'standing mute,' that is, virtually, of demanding ordeal, was only abolished in 1772. . . . Five and a half centuries were thus allowed to pass before the criminal law was bold enough, in defiance of a fundamental principle of *Magna Carta*, to deprive accused men of their 'law.'" *Magna Carta*, p. 441, note. But any one who considers how ancient customs are retained long after the reasons for those customs have disappeared, and on this point see Lucy, *Diary of the Salisbury Parliament*, 196 et seq.; may well doubt whether there is any force in the contention that the right of standing mute was retained because it was thought that a change would be in violation of *Magna Carta*. McKechnie, however, also says that "*lex terrae*" gradually changed its meaning and that this change was reflected in subsequent statutes reaffirming, expanding or explaining *Magna Carta*: p. 441; see also p. 442. He calls

“Due process of law” in England.

78. By later statutes a provision for due process of law was gradually substituted for the law of the land provision,²⁴ and in view of the wording of those statutes it

attention (p. 208) to the fact that Coke “reads into Magna Carta the entire body of the common law of the seventeenth century,” that “the various clauses of Magna Carta are thus merely occasions for expounding the law as it stood, not at the beginning of the thirteenth century, but in his own day.” Has the learned author also erred in reading into the Great Charter the law of the thirteenth century? Or can he say that as for that period it is not possible to distinguish between the *meaning* of the term “the law of the land” and the *contents* of the law of the land? On the distinction see p. 168, *infra*.

²⁴ By 9 Hen. III, cap. 29, confirmed 25 Edw. I, it was provided that “no freeman shall be arrested or imprisoned or deprived of his freehold or liberties or free customs or be outlawed or banished or in any way molested, and we will not set forth against him nor send against him unless by the lawful judgment of his peers and by the law of the land. To no man will we sell or deny or defer right and justice.” By 5 Edw. III cap. 9, it was “accorded and established, that no man henceforth may be attached by any accusation nor forejudged of life or limb, nor his lands, tenements, goods nor chattels seized into the hands of the king against the form of the Great Charter and the law of the land.” By 25 Edw. III, stat. 5, cap. 4, it was provided that “whereas it is contained in the Great Charter of the Franchises of England that no one may be taken nor imprisoned nor deprived of his freehold nor of his franchises nor his free customs unless it be by the law of the land, it is accorded, assented and established that from henceforth none may be taken by petition or suggestion made to our lord the king or to his council unless it be by indictment or presentment of good and lawful men of the neighborhood where such deeds be done, in due manner or by process made upon original writ at the common law; nor shall any one be deprived of his franchises or his freehold unless he be himself placed duly in response and judged of those things by the course of the law; and if anything shall be done to the contrary let it be redressed and held for naught.” See also Rot. Parl., II, 239. By 28 Edw. III, cap. 3, it was provided that “no man, of whatever estate or condition he may be, may be put out of his land or tenement, nor taken, nor imprisoned, nor disinherited nor put to death without being brought in answer by due process of law.” By 37 Edw. III, cap. 18, it was declared that “though it be contained in the Great Charter that no man be taken, nor imprisoned, nor put out of his freehold, without process of the law, nevertheless divers people make false suggestion to the king himself, as well for malice as otherwise, whereof the king is often grieved, and divers of the realm put in damage, against the form of the same charter; wherefore it is ordained

seems clear that the desire related simply to procedure, and it seems that the desire was for the procedure which was lawful at the time of the proceeding. Of course, if there was any difference in meaning between the two provisions the provision for due process of law supplanted the provision for the law of the land.

The provisions compared.

79. But the two provisions apparently had the same meaning, or, rather, whatever may have been the meaning of the law of the land provision when it was placed in Magna Carta, when that provision was supplanted by the due process provision the two clauses were apparently regarded as synonymous. It is probable that the law of the land provision was understood to be merely a requirement that there should be a procedure which was in accordance with the law of the land and that the due process provision in the later statutes was intended merely as a requirement of a procedure which was made due by the law of the land. Such interpretations are decidedly plausible. And

that all they that make suggestions be sent with the suggestions before the chancellor, treasurer and his council, and that they there find surety to pursue their suggestions, and incur the same pain that the other would have had if he were attainted, in case his suggestion be found evil; and that then process of the law be made against them, without being taken or imprisoned against the form of the said charter and other statutes." And by 42 Edw. III, cap. 3, it was declared that "at the request of the commons by their petition set forth in that parliament to do away with the mischiefs and damages done to many of the said commons by false accusers who often have made their accusations more for revenge and private gain than for the benefit of the king or of his people, which accused persons have been sometimes taken and at other times made to come before the council of the king by writ or otherwise under grievous pain and against the law, it is assented and accorded for the good government of the commons that no man may be put to answer without presentment before justices or matter of record or by due process and writ original according to the old law of the land, and if anything henceforth be done to the contrary it shall be void in law and held for error."

the two provisions must be so understood if Coke was justified in declaring that the law of the land provision was to be interpreted (as intervening generations had apparently interpreted it) by the due process provision,²⁵ and if the Supreme Court is correct in saying that, conversely, the requirement of due process of law is equivalent to the earlier requirement of the law of the land. Those statements are correct only if we may say, as the court said in *Walker v. Sauvinet*,²⁶ that due process of law means the process which is due according to the law of the land. If the meaning of one provision was different from that of the other, if its scope was either broader or narrower, then, of course, one provision may not be interpreted by the other, and, as already pointed out, we must remember that the due process provision supplanted the provision for the law of the land.

The term "law of the land" sometimes used in broader sense.

80. Before we consider the position of the court that the due process provision has a more extensive meaning in this country than the provision for the law of the land had in England, we must observe that the term "the law of the land" is sometimes used in the present day in a sense which is broader than that which has just been considered. It is sometimes used as meaning the law of the state or the law of the country and as relating to more than procedure.²⁷

²⁵ Coke, *Institutes*, II, 50. See also Baldwin, *The Courts as Conservators of Social Justice*, 9 Col. L. Rev. 567, 571; Corwin, *Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 369, 371, 372; Reeves, *History of the English Law*, quoted at end of note 22, *supra*. Reeves's book was published before the adoption of the Fifth Amendment.

²⁶ (1875) 92 U. S. 90, 93.

²⁷ For example, in Article VI of the Federal Constitution, where, how-

But while the provision for the law of the land, as that term was used in early times, was quite possibly intended simply as a requirement of what was later called due process of law, it certainly does not follow that, on the other hand, the provision for due process of law is equivalent to a provision for the law of the land when the latter term is used in its broadest sense—as relating to more than procedure. This point must be carefully borne in mind.

Term has same general scope in America as in England.

81. And yet, even if we assume that “due process of law” means “the law of the land” in the broadest sense of the latter term, we must note that such a requirement would have in general the same effect in this country as it would have in England.

Of course, we have in this country a supreme law of the land and when it speaks it must be obeyed by the organ or organs of government to which it speaks. But not all of the law of the jurisdiction is contained in the constitutions. This truth is elementary. And that portion of the law of the jurisdiction which is not contained in the constitutions is, in this country as in England, changeable by the appropriate authorities, although only the appropriate authorities may change or disregard it.

How may the “law of the land” be changed?

82. In England the Parliament, subject to a veto power which has not been exercised since 1707,²⁸ may change the law in any respect,²⁹ while the king has not for centuries had the power to disregard the law or to change the

ever, there is a qualifying adjective which limits its meaning. On the phraseology of this article see Thayer, John Marshall, 64.

²⁸ Anson, *The Law and Custom of the Constitution*, 3d ed., I, 301.

²⁹ See note 9 in Chapter 2, *supra*.

law without the consent of Parliament.³⁰ And in this country the legislative department of government has a power to change the law which is different from the power of a president or governor. The state legislatures, over subject-matters not withdrawn from their control, and Congress over subject-matters entrusted to it, have all governmental powers which are not entrusted by the constitutions to other organs of government and which are not withdrawn from the control of those legislative bodies by other provisions of the constitutions, while the executive department of government, on the other hand, possesses only powers which are granted to it by law, and those powers must be exercised in a manner recognized by law.³¹

In other words, we have profited by the struggles which our ancestors had with their kings and, by the distribution of governmental powers in our constitutions, we have made it clear that our executives are without power to act contrary to the law and have not that power to change the law which our legislatures do possess. The various departments of government stand in the same relation to each other as regards the law of the state or the law of the country in the United States as they did in England.

To say, then, that all parts of the law of the land are equally unchangeable, or to say that that part of the law of the land which is not the supreme law of the land is unchangeable by the legislature because unchangeable by the executive, would be to disregard thoroughly established distinctions. While other departments of govern-

³⁰ Bill of Rights (1689); *The Case of Captain Streater* (1653) 5 How. State Trials, 365, 368. And see Pollock and Maitland, *History of English Law*, I, 1st ed., 152, 2d ed., 173; Anson, *The Law and Custom of the Constitution*, 3d ed., I, chap. 9, II, pp. 33, 34; Lowell, *The Government of England*, I, 22; 12 Coke, 76 (1611). Compare Lowell, *op. cit.*, I, 23, 24.

³¹ See authorities cited in secs. 31, 33, 37, *supra*.

ment are restrained by the law of the land, only that part of the law of the land which the constitution makes the supreme law of the land is unchangeable by legislation.³²

The Constitution does not make the "law of the land" unchangeable.

83. One point more remains to be noticed. It might be claimed that a requirement in a constitution that the law of the land should be observed would require the observance of the law of the jurisdiction as it stood at the time when the provision was placed in the constitution.³³ And in support of that contention it might be said with truth that in interpreting a provision of a constitution it must be given the meaning which it had at the time of its adop-

³² See also *Sumpter v. State* (1906) 81 Ark. 60, 62, 98 S. W. 719, 720; *Mayo v. Wilson* (1817) 1 N. H. 53, 57; *State v. —* (1794) 1 Hayw. (N. C.) 28. "Did, then, the phrase, 'law of the land,' which is the universal form in these [early state] constitutions, import any limitation upon legislative power? There are three good reasons for thinking not. In the first place, 'the judgment of peers,' signifying in our constitutional usage trial by jury, which is usually alternative to 'law of the land' and therefore apparently displaceable by it, is often further safeguarded by a clause rendering it inviolable in all cases in which it had hitherto been used, a clause to which the members of the legislature were sometimes required to take special oaths of fidelity. In the second place, moreover, if 'law of the land' meant something else than statutory enactment, that something could have been only the common law, which, however, is adopted in these same constitutions, when specific mention is made of it, only until the legislature may choose to alter it. Finally, in the early days of judicial review, a number of cases arose in which the Law of the Land clause would certainly have been brought forward had it been deemed available as a constitutional restriction upon legislative power. The argument from silence is often of dubious value, but in a case of this sort it is almost conclusive:" Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 370, 371. See also 24 Harv. L. Rev. at 372.

³³ Consider *Twining v. New Jersey* (1908) 211 U. S. 78, 100, 101, 29 Sup. Ct. 14, 20, 53 L. ed. 97; Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 373; note 23, *supra*; and also *Montana Co. v. St. Louis M. & M. Co.* (1894) 152 U. S. 160, 168, 14 Sup. Ct. 506, 508, 38 L. ed. 398.

tion.³⁴ No organ of government can change that meaning. Such a change can be made only by constitutional amendment.

But while the **meaning** which the term "the law of the land" had when placed in the constitution might not be changed, it certainly does not follow that the **contents** of the law of the land, except so much of it as is the supreme law of the land, might not be changed by ordinary legislation. The distinction will be shown best by referring to a case which seems to be analogous. Congress cannot so narrow the meaning of the word "crimes" in the second clause of Article III of the Federal Constitution as to allow the infliction of heavy penalties where the guilt of the person convicted has not been determined by a jury; yet, while it cannot change the meaning of the word "crimes," it can unquestionably increase or diminish the number of crimes.³⁵ The Constitution did not crystallize and render unchangeable the criminal law of a hundred and twenty-five years ago. And so also the fact that the meaning of the term "the law of the land" might not be altered by legislation does not show that the provisions of the law of the land might not be changed in that manner.

The "law of the land" may be different in the several states.

84. Moreover, just as the meaning of the due process provision of the Fourteenth Amendment remains the same from year to year, so also it doubtless has the same meaning in one state as it has in another.³⁶ But it does not

³⁴ See authorities cited at beginning of note 11 in Chapter 3, *supra*.

³⁵ See *Schick v. United States* (1904) 195 U. S. 65, 24 Sup. Ct. 826, 49 L. ed. 99; and also *The Lottawanna* (1874) 21 Wall. 558, 576, 22 L. ed. 654.

³⁶ See *King v. Mullins* (1898) 171 U. S. 404, 422, 18 Sup. Ct. 925, 932, 43 L. ed. 214.

follow from this that the court should hold that the provision has the same ultimate legal effect in all states, or, in other words, that a procedure which must be observed in one state in order to afford due process of law there must be observed in another state in order to afford due process of law in the latter state. Just as, as previously pointed out, there may be changes in the law from time to time, so also it seems clear that the court has decided correctly when it has held that the law may be different in different states.³⁷

Judicial alteration of the "law of the land."

85. The statements which have just been made as to the alterability of the law of the land may seem to be inconsistent with the decision in *Twining v. New Jersey*,³⁸ one of the few cases in the United States Supreme Court in which the proposition that the due process provision is equivalent to the provision for the law of the land has been expressly made the basis of the decision,³⁹ and apparently the only recent one of those cases. In that case the court hovered around the thought that the procedure which existed when the due process clause was adopted has some bearing upon the constitutionality of procedure to-day,⁴⁰ and while the court conceded that the early pro-

³⁷ See *Walker v. Sauvinet* (1875) 92 U. S. 90, 93, 23 L. ed. 678; *Missouri v. Lewis* (1879) 101 U. S. 22, 31, 25 L. ed. 989; *Sauer v. New York* (1907) 206 U. S. 536, 548, 27 Sup. Ct. 686, 690, 51 L. ed. 1176.

³⁸ (1908) 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97.

³⁹ 211 U. S. at 100, 106, 108, 29 Sup. Ct. at 20, 22, 23, 53 L. ed. 107.

⁴⁰ It said that "What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country:" 211 U. S. at 100, 29 Sup. Ct. at 20, 53 L. ed. at 107. (Compare 24 Harv. L. Rev. 373; 21 Harv. L. Rev. 495, 496, 497.) But the court, instead of stand-

cedure is subject to some changes,⁴¹ it said that "consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government."⁴²

But we must note that in that case, which involved simply the constitutionality of the decision of a state court upon a question of evidence and in which that decision was sustained, it was not shown that the state court had power to make material alterations in the law of the land as it existed at the time of the adoption of the due process provision or that that law had been changed by legislation or by amendment of the state constitution. For that reason an inquiry into the requirements of the law of the land as it stood at the time of the adoption of the due process provision was entirely proper.⁴³ And although this point was not brought out by the court, it marks the

ing squarely on the proposition that the due process clause requires the observance of the particular procedure which was in accordance with the law of the land at the moment when the due process clause was placed in the Constitution, then marked the limits of the statement which it had just made by restating it in the following quotation from *Hurtado v. California* (1884) 110 U. S. 516, 528, 4 Sup. Ct. 111, 292, 117, 28 L. ed. 232, "A process of law, . . . which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country:" 211 U. S. at 101, 29 Sup. Ct. at 20, 53 L. ed. at 107.

⁴¹ "It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment:" 211 U. S. at 101, 29 Sup. Ct. at 20, 53 L. ed. at 107. See also cases there cited.

⁴² 211 U. S. at 101, 29 Sup. Ct. at 20, 53 L. ed. at 107.

⁴³ See p. 105, *supra*.

extent to which the decision may be relied upon in the interpretation of the provision for due process of law.

It will be necessary later in this chapter to refer more fully to the expressions of the court which have just been quoted and to other expressions in that opinion.⁴⁴ They involve questions which require extended treatment. But it seems desirable, before doing so, to consider one other argument which might be advanced in support of the proposition that the due process clauses restrain Congress and the state legislatures and which may be examined more briefly.

THE ARGUMENT CONCERNING REDUNDANCY.

The question stated.

86. The Constitution does not declare what constitutes a "due" process. Yet, reading the words in their natural sense, it seems clear that it means simply the process which the person involved is entitled to receive. The provision does not say that there must be a suitable process or a desirable process. It does not purport to create any new rights. It simply says that the person involved shall receive the process which is due to him. The dueness of the process is left to depend upon tests which are extrinsic to that provision of the Constitution.

Now, if it were held that "due process of law is process due according to the law of the land"⁴⁵ and that so much of the law of the land as is not contained in the Constitution may be changed by the appropriate authorities,⁴⁶ the provision would be superfluous in the Fifth Amendment,

⁴⁴ See secs. 92, 97, *infra*.

⁴⁵ *Walker v. Sauvinet* (1875) 92 U. S. 90, 93, 23 L. ed. 678.

⁴⁶ See secs. 31, 33, *supra*, 97, *infra*.

although, for reasons which will be pointed out, it would not be superfluous in the Fourteenth Amendment. And it may be urged that an interpretation of a clause of the Constitution under which that clause must be considered useless is necessarily unsound and that, therefore, the provision must have some other meaning.

The question elaborated.

87. If the due process clause of the Fifth Amendment were held to require merely that the procedure followed when a person is deprived of life, liberty or property must be that procedure which has been prescribed by the governmental organ which has authority to prescribe the procedure, the clause would be unnecessary, since the same restraint is contained in those clauses of the Constitution which distribute governmental powers among three departments of government.

The due process clause of the Fifth Amendment would still be superfluous even though it were held to require also that the procedure do not violate procedural rights which are secured by other provisions of the Federal Constitution; and so also would the clause in the Fourteenth Amendment be superfluous if it referred merely to those procedural rights which are secured by other provisions of the Federal Constitution, such as the prohibition of bills of attainder and the full faith and credit clause.

The due process clause of the latter Amendment could not be regarded as superfluous if it were held to include in its protection procedural rights secured by the respective state constitutions or by statutes or subordinate regulations⁴⁷ in those states, inasmuch as questions of compliance with the procedural requirements would thus be

⁴⁷ As rules of court, ordinances, administrative regulations.

made federal questions. But, as a matter of fact, the United States Supreme Court in cases coming from state courts does not inquire whether the action of an organ of state government conforms to the procedural requirements of the state constitution⁴⁸ or to other valid procedural restraints upon the organs of government;⁴⁹ and in cases arising in federal courts those courts follow the interpretations which have been given to the state constitutions and the state statutes by the state courts.⁵⁰

Now, unless the United States Supreme Court has decided incorrectly when it declared that the Fourteenth Amendment "did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people,"⁵¹ the federal courts unquestionably ought, as a general rule, to

⁴⁸ See note 45 in Chapter 3, *supra*.

⁴⁹ See note 46 in Chapter 3, *supra*.

⁵⁰ See note 47 in Chapter 3, *supra*.

⁵¹ *Felts v. Murphy* (1906) 201 U. S. 123, 129, 26 Sup. Ct. 366, 368, 50 L. ed. 689; *Orr v. Gilman* (1902) 183 U. S. 278, 286, 22 Sup. Ct. 213, 216, 46 L. ed. 213; *Maxwell v. Dow* (1900) 176 U. S. 581, 593, 20 Sup. Ct. 448, 494, 453, 44 L. ed. 597; *McPherson v. Blacker* (1892) 146 U. S. 1, 39, 13 Sup. Ct. 3, 12, 36 L. ed. 869; *In re Kemmler* (1890) 136 U. S. 436, 448, 10 Sup. Ct. 930, 934, 34 L. ed. 519. See also *Slaughter House Cases* (1872) 16 Wall. 36, 78, 21 L. ed. 394; *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 157, 17 Sup. Ct. 56, 62, 41 L. ed. 369; *Giozza v. Tiernan* (1893) 148 U. S. 657, 662, 13 Sup. Ct. 721, 723, 37 L. ed. 599; *Davidson v. New Orleans* (1877) 96 U. S. 97, 103, 104, 24 L. ed. 616; *Hodges v. United States* (1906) 203 U. S. 1, 16, 27 Sup. Ct. 6, 8, 51 L. ed. 65; *Robertson v. Baldwin* (1897) 165 U. S. 275, 281, 17 Sup. Ct. 326, 329, 41 L. ed. 715; the quotation of *Providence Bk. v. Billings* (1830) 4 Pet. 514, 563, 7 L. ed. 939, with apparent approval in *Michigan C. R. Co. v. Powers* (1906) 201 U. S. 245, 296, 26 Sup. Ct. 459, 463, 50 L. ed. 744; and the language of *Holmes, J.*, in *Interstate C. S. Ry. Co. v. Commonwealth* (1907) 207 U. S. 79, 87, 28 Sup. Ct. 26, 28, 52 L. ed. 111; *Otis Co. v. Ludlow M. Co.* (1906) 201 U. S. 140, 154, 26 Sup. Ct. 353, 355, 50 L. ed. 696; *Paddell v. City of New York* (1908) 211 U. S. 446, 448, 29 Sup. Ct. 139, 53 L. ed. 275; *Laurel Hill Cemetery v. San Francisco* (1910) 216 U. S. 358, 366, 30 Sup. Ct. 301, 302, 54 L. ed. 515. Compare 32 Am. L. Reg. N. S. 1096, 1097.

follow the decisions of state courts in matters of state law. But, in view of the due process clause, it is quite possible that they would be justified in going so far as to inquire into the observance of procedural requirements; and the failure of the federal courts to make such inquiries may be due to the fact that they have never considered sufficiently the propriety of doing so.⁵²

Still, under any of the interpretations of the due process provision which have just been suggested, the clause in the Fifth Amendment must be regarded as superfluous.

Discussion of question of redundancy.

88. But it is not self-evident that there can be no repetition of thought in the Constitution, and while the fact that under a particular interpretation a provision of the Constitution would be superfluous is entitled to weight,⁵³ it is not sufficient to prove that that interpretation is incorrect. Certainly if the provision had that meaning before it was placed in the Constitution, or if there is a sufficient explanation of its insertion, although superfluous, in

⁵² Professor Henry Schofield, in 3 Ill. L. Rev. 195, contends that the United States Supreme Court should inquire whether state courts clearly disregard or misapply the laws of their respective states. He does not, however, limit his contention to laws dealing with procedure. See latter part of note 47 in Chapter 3, *supra*, on the position of the Supreme Court on this question.

⁵³ *Hurtado v. California* (1884) 110 U. S. 516, 534, 4 Sup. Ct. 111, 292, 120, 28 L. ed. 232; *Marbury v. Madison* (1803) 1 Cranch, 137, 174, 2 L. ed. 60. See also *Davidson v. New Orleans* (1877) 96 U. S. 97, 105, 24 L. ed. 616; *Twining v. New Jersey* (1908) 211 U. S. 78, 110, 29 Sup. Ct. 14, 24, 53 L. ed. 97; *Mackin v. United States* (1886) 117 U. S. 348, 351, 352, 6 Sup. Ct. 777, 778, 779, 29 L. ed. 909; *Minor v. Happersett* (1874) 21 Wall. 162, 175, 22 L. ed. 627; *In re Kemmler* (1890) 136 U. S. 436, 448, 10 Sup. Ct. 930, 934, 34 L. ed. 519; *Hallinger v. Davis* (1892) 146 U. S. 314, 323, 13 Sup. Ct. 105, 108, 36 L. ed. 986; 4 Harv. L. Rev. at 381; *Western U. T. Co. v. Railroad Comn. of La.* (1908) 120 La. 758, 45 So. 598. Compare *Yesler v. Washington H. L. Comrs.* (1892) 146 U. S. 646, 655, 13 Sup. Ct. 190, 194, 36 L. ed. 1119.

the Constitution, or if a different interpretation would require an exercise by the courts of a power which was not granted to them by the Constitution—such circumstances must outweigh any argument concerning redundancy.

The due process provision did not make its first appearance in the Fifth Amendment.⁵⁴ It had an English origin. The meaning which the provision possessed before it was placed in the Federal Constitution may properly be considered by the court; and for that reason when the court declared in *Walker v. Sauvinet*⁵⁵ that “due process of law is process due according to the law of the land” its statement is plausible, and that statement must be accepted unless it can be shown to be incorrect or unless the validity of some different statement can be established.

The provision occurs in the Federal Constitution apparently as a survival from earlier times. Those who adopted the Fifth Amendment probably did not realize when they placed the due process provision in the Constitution that those clauses of the Constitution which distribute governmental powers among three departments of government by necessary implication provide that the procedure followed must be one which has been prescribed by the governmental organ which has authority to prescribe the procedure and that it was unnecessary for them to follow precedent and insert the same restraint also in the form in which it appeared in the English constitution. Or they may have desired, even at the expense of repetition, to make this restraint perfectly clear, through fear that there might some day come into power a president who would not have a scrupulous regard for the constitutional limitations upon his authority.

⁵⁴ See note 24, *supra*.

⁵⁵ (1875) 92 U. S. 90, 93, 23 L. ed. 678.

And, finally, there is no other natural meaning of the words "due process of law" than "the process to which the person involved is entitled under the law of the land." The Constitution simply says that he shall receive the process which is due to him. There is nothing in the provision to show that those who adopted the Fifth Amendment intended to create any other test of due process than that which would have existed if the provision had never been placed in the Constitution. There is nothing in the Constitution which so perpetuates the law of the land as it existed when the provision was adopted as to interfere with its alteration by the appropriate authorities.⁵⁶ And for the courts to declare tests of due process which are not authorized by the Federal Constitution is to exercise a veto-power which it was never intended that they should exercise,⁵⁷ and is judicial usurpation of the most serious character.⁵⁸

DISCRIMINATION.

Position of court on discriminatory state action.

89. In a case in which no objection was made to the method of adoption or enforcement of an ordinance sustained by state authority, the court of last resort has declared that, under the due process clause of the Fourteenth Amendment, the discriminatory character of the ordinance was an objection to its validity.⁵⁹ In a case in

⁵⁶ See secs. 31, 33, *supra*, 97, *infra*.

⁵⁷ See authorities cited in note 13, *supra*.

⁵⁸ For instance of comments by recent writers see Boudin, *Government by Judiciary*, 26 *Pol. Sci. Quar.* 238, 264, 266, 267 et seq.

⁵⁹ *Dobbins v. Los Angeles* (1904) 195 U. S. 223, 25 *Sup. Ct.* 18, 49 *L. ed.* 169. The city had fixed limits within which gas works might be built. An individual had promptly bought land within that district, secured a permit and spent thousands of dollars on the erection of a plant. Shortly there-

which a state board discriminated in the assessment of taxes upon property of the same class, the action of the state board was also held to be in violation of the Fourteenth Amendment.⁶⁰ And the court has declared that arbitrary exercises of the power of a state over an individual would violate the due process requirement, apparently using the word "arbitrary," in some instances, at least, as meaning "not in accordance with fixed rules,"⁶¹ al-

after the city so changed the limits as to exclude the new structure from the privileged district. The state court upheld the latter ordinance, but the court of last resort reversed that judgment, saying that where an ordinance oppresses or discriminates against a class or an individual the courts may consider the purpose of the ordinance. "We think the allegations of the bill disclose such character of territory, such sudden and unexplained change of its limits after the plaintiff in error had purchased the property and gone forward with the erection of the works, as to bring it within that class of cases wherein the court may restrain the arbitrary and discriminatory exercise of the police power which amounts to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment:" 195 U. S. 240, 241, 25 Sup. Ct. 22, 49 L. ed. 177. Compare *Patterson v. Colorado* (1907) 205 U. S. 454, 461, 27 Sup. Ct. 556, 557, 51 L. ed. 879; *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220, cited in *Dobbins v. Los Angeles*, was decided under the equal protection provision.

⁶⁰ *Raymond v. Chicago U. T. Co.* (1907) 207 U. S. 20, 28 Sup. Ct. 7, 52 L. ed. 78. The court speaks of both the due process and the equal protection provision of the Fourteenth Amendment, so that it is not entirely clear under which clause the court held the action of the state board to be unconstitutional; but the opinion may be read in the light of the dissenting opinion, which refers only to the due process provision.—On the bearing of the due process clause on discrimination, see also *Hibben v. Smith* (1903) 191 U. S. 310, 326, 24 Sup. Ct. 88, 92, 48 L. ed. 195; *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 691, 19 Sup. Ct. 565, 568, 43 L. ed. 858; *Eldridge v. Trezevant* (1896) 160 U. S. 452, 468, 16 Sup. Ct. 345, 349, 40 L. ed. 490; *Marchant v. Pennsylvania R. Co.* (1894) 153 U. S. 380, 386, 14 Sup. Ct. 894, 896, 38 L. ed. 751; *In re Converse* (1891) 137 U. S. 624, 632, 11 Sup. Ct. 191, 193, 34 L. ed. 796; *In re Kemmler* (1890) 126 U. S. 436, 448, 449, 10 Sup. Ct. 930, 934, 34 L. ed. 519; *Hurtado v. California* (1884) 110 U. S. 516, 535, 4 Sup. Ct. 111, 292, 121, 28 L. ed. 232; *Bacon v. Walker* (1907) 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499; *New York ex rel. Hatch v. Reardon* (1907) 204 U. S. 152, 27 Sup. Ct. 188, 51 L. ed. 415; *People v. Van de Carr* (1905) 199 U. S. 552, 26 Sup. Ct. 144, 50 L. ed. 305.

⁶¹ See *Twining v. New Jersey* (1908) 211 U. S. 78, 111, 113, 29 Sup. Ct.

though the court concedes that such fixed rules may be limited in their scope, saying that "If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation."⁶²

Position of court on fraud and improper motives.

90. Possibly it is on the same or a similar ground that the court has suggested that a deprivation of property by an administrative authority would be without due process

14, 25, 53 L. ed. 97; *Dobbins v. Los Angeles* (1904) 195 U. S. 223, 241, 25 Sup. Ct. 18, 22, 49 L. ed. 169; *People v. Van de Carr* (1905) 199 U. S. 552, 558, 560, 26 Sup. Ct. 144, 145, 146, 50 L. ed. 305; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 28, 25 Sup. Ct. 358, 362, 49 L. ed. 643; *Hibben v. Smith* (1903) 191 U. S. 310, 325, 24 Sup. Ct. 88, 92, 48 L. ed. 195; *Hodgson v. Vermont* (1897) 168 U. S. 262, 272, 18 Sup. Ct. 80, 83, 42 L. ed. 461; *Giozza v. Tiernan* (1893) 148 U. S. 657, 662, 13 Sup. Ct. 721, 724, 37 L. ed. 599; *Leeper v. Texas* (1891) 139 U. S. 462, 468, 11 Sup. Ct. 577, 579, 35 L. ed. 225; *Caldwell v. Texas* (1891) 137 U. S. 692, 697, 698, 11 Sup. Ct. 224, 226, 34 L. ed. 816; *In re Converse* (1891) 137 U. S. 624, 631, 632, 11 Sup. Ct. 191, 193, 34 L. ed. 796; *Dent v. West Virginia* (1889) 129 U. S. 114, 123, 124, 9 Sup. Ct. 231, 234, 32 L. ed. 623; *Hurtado v. California* (1884) 110 U. S. 516, 536, 4 Sup. Ct. 111, 292, 121, 28 L. ed. 232; and also *Quong Wing v. Kirkendall* (1912) 223 U. S. 59, 62, 32 Sup. Ct. 192, 193, 56 L. ed. 350; *Kentucky U. Co. v. Kentucky* (1911) 219 U. S. 140, 161, 31 Sup. Ct. 171, 180, 55 L. ed. 137; *Bacon v. Walker* (1907) 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499; *Missouri P. Ry. Co. v. Humes* (1885) 115 U. S. 512, 519, 6 Sup. Ct. 110, 112, 29 L. ed. 463; dissenting opinion in *Fong Yue Ting v. United States* (1893) 149 U. S. 698, 703, 13 Sup. Ct. 1016, 1041, 37 L. ed. 905; 24 Harv. L. Rev. 476, note.—On the word "arbitrary" as used in another sense, see secs. 105, 116, 117, *infra*.

⁶² *Carroll v. Greenwich I. Co.* (1905) 199 U. S. 401, 411, 26 Sup. Ct. 66, 67, 50 L. ed. 246. See also *Lindsley v. Natural C. G. Co.* (1911) 220 U. S. 61, 81, 31 Sup. Ct. 337, 341, 55 L. ed. 369; *Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U. S. 502, 505, 31 Sup. Ct. 490, 491, 55 L. ed. 561; *Johnson v. United States* (1913) 228 U. S. 457, 458, 33 Sup. Ct. 572, 57 L. ed. 919.

of law if it were the result of fraud.⁶³ The court has, however, declared that it cannot inquire whether a legislature acted corruptly.⁶⁴ "The decisions of this court from the

⁶³ For declarations on the finality of administrative decisions in the absence of fraud see *Chicago, B. & Q. Ry. Co. v. Babcock* (1907) 204 U. S. 585, 598, 27 Sup. Ct. 326, 329, 51 L. ed. 636; *People v. New Y. S. B. of T. Comrs.* (1905) 199 U. S. 48, 52, 25 Sup. Ct. 713, 715, 50 L. ed. 79; *Field v. Barber A. P. Co.* (1904) 194 U. S. 618, 624, 625, 24 Sup. Ct. 784, 787, 48 L. ed. 1142; *San Diego L. & T. Co. v. Jasper* (1903) 189 U. S. 439, 441, 23 Sup. Ct. 571, 572, 47 L. ed. 892 (where water rates were involved); *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 515, 516, 22 Sup. Ct. 95, 100, 46 L. ed. 298; *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 168, 169, 17 Sup. Ct. 56, 66, 67, 41 L. ed. 369; *Pittsburgh, C., C. & St. L. Ry. Co. v. Backus* (1894) 154 U. S. 421, 434, 14 Sup. Ct. 1114, 1120, 38 L. ed. 1031; and also *Coulter v. Louisville & N. R. Co.* (1905) 196 U. S. 599, 25 Sup. Ct. 342, 49 L. ed. 615; *City of Seattle v. Kelleher* (1904) 195 U. S. 351, 359, 25 Sup. Ct. 44, 45, 49 L. ed. 232; *California R. Co. v. Sanitary R. Works* (1905) 199 U. S. 306, 320, 26 Sup. Ct. 100, 104, 50 L. ed. 204; *Adams Ex. Co. v. Ohio* (1897) 165 U. S. 194, 229, 17 Sup. Ct. 305, 312, 41 L. ed. 683; *United States v. California & O. L. Co.* (1893) 148 U. S. 31, 43, 13 Sup. Ct. 458, 463, 37 L. ed. 354. In *Dobbins v. Los Angeles* (1904) 195 U. S. 223, 240, 25 Sup. Ct. 18, 22, 49 L. ed. 169, the court said, "Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged wrongful motives inducing the passage of an ordinance is not a question necessary to be determined in this case, but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance." See also *Henderson B. Co. v. Henderson City* (1899) 173 U. S. 592, 614, 616, 19 Sup. Ct. 553, 562, 43 L. ed. 823; *Backus v. Fort S. U. D. Co.* (1898) 169 U. S. 557, 576, 18 Sup. Ct. 445, 452, 42 L. ed. 853; *Vicksburg v. Vicksburg W. Co.* (1907) 206 U. S. 496, 27 Sup. Ct. 762, 51 L. ed. 1155; quotations in *French v. Barber A. P. Co.* (1901) 181 U. S. 324, 336, 337, 340, 21 Sup. Ct. 625, 629, 630, 631, 45 L. ed. 879; latter part of note 64, *infra*. With cases in this note compare *Spring V. W. v. San Francisco* (1903) 124 Fed. 574, 584-588.

⁶⁴ This was asserted in *Angle v. Chicago, St. P., M. & O. Ry. Co.* (1894) 151 U. S. 1, 18, 14 Sup. Ct. 240, 247, 38 L. ed. 55, where, however, no reference was made to the due process provision, and in concurring opinion in *Taylor and Marshall v. Beckham* (1900) 178 U. S. 548, 585, 20 Sup. Ct. 890, 1009, 903, 44 L. ed. 1187, where the due process clause was directly involved. See also *Calder v. Michigan* (1910) 218 U. S. 591, 598, 31 Sup. Ct. 122, 123, 54 L. ed. 1163; *United States v. Des Moines N. & Ry. Co.* (1892) 142 U. S. 510, 545, 12 Sup. Ct. 308, 318, 35 L. ed. 1099; *United*

beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. . . . No case can be found announcing such a doctrine, and on the contrary the doctrine of a number of cases is inconsistent with its existence.”⁶⁵

Discussion.

91. On the other hand, the court has declared once or twice that Congress is not forbidden by the Constitution to enact discriminatory legislation.⁶⁶ Now, as the due

States v. Old Settlers (1893) 148 U. S. 427, 466, 13 Sup. Ct. 650, 666, 37 L. ed. 509; *The Chinese Exclusion Case* (1889) 130 U. S. 581, 603, 9 Sup. Ct. 623, 629, 32 L. ed. 1068; *Soon Hing v. Crowley* (1885) 113 U. S. 703, 711, 5 Sup. Ct. 730, 734, 28 L. ed. 1145; 6 A. & E. Enc. of L., 2d ed., 1087; *Wigmore on Evidence*, p. 1656; *Sutherland, Statutory Construction*, sec. 84; *Cooley, Constitutional Limitations*, 7th ed., p. 258; *Dillon, Municipal Corporations*, 5th ed., p. 1157; *Willoughby on the Constitution*, p. 18; *Polk v. Mutual R. F. L. Assn.* (1907) 207 U. S. 310, 326, 28 Sup. Ct. 65, 71, 52 L. ed. 222; *Red “C” O. Co. v. Board of Agriculture* (1912) 222 U. S. 380, 392, 32 Sup. Ct. 152, 154, 56 L. ed. 240; *Hammond P. Co. v. Arkansas* (1909) 212 U. S. 322, 343, 29 Sup. Ct. 370, 377, 53 L. ed. 530; *Ellis v. United States* (1907) 206 U. S. 246, 256, 27 Sup. Ct. 600, 601, 51 L. ed. 1047; separate opinion of Taney, C. J., in *License Cases* (1847) 5 How. 504, 583, 12 L. ed. 256. Compare *Dillon, Municipal Corporations*, 5th ed., pp. 1157, 1158; and also the case of *Lochner v. New York* (1905) 198 U. S. 45, 63, 25 Sup. Ct. 539, 545, 49 L. ed. 937, where the motive of the legislature is considered, although fraud is not charged, and the comments on this case in *Green Bag*, 1905, p. 414.—On proving improper motives see *Coulter v. Louisville & N. R. Co.* (1905) 196 U. S. 599, 610, 25 Sup. Ct. 342, 345, 49 L. ed. 615, and *Soon Hing v. Crowley* (1885) 113 U. S. 703, 711, 5 Sup. Ct. 730, 734, 28 L. ed. 1145, which arose under the equal protection provision; and see *Fayerweather v. Ritch* (1904) 195 U. S. 276, 307, 26 Sup. Ct. 58, 67, 68, 49 L. ed. 193; *Chicago, B. & Q. R. Co. v. Babcock* (1907) 204 U. S. 585, 593, 27 Sup. Ct. 326, 327, 51 L. ed. 636, on proving the reasons for a decision.

⁶⁵ *McCray v. United States* (1904) 195 U. S. 27, 56, 24 Sup. Ct. 769, 776, 49 L. ed. 78.

⁶⁶ *United States v. Delaware & H. Co.* (1909) 213 U. S. 366, 417, 29 Sup. Ct. 527, 539, 53 L. ed. 836. See also *District of Columbia v. Brooke* (1909)

process clause of the Fifth Amendment applies to Congress,⁶⁷ and as we may assume that that clause has in general the same meaning as the due process clause of the Fourteenth Amendment,⁶⁸ these statements seem to be inconsistent with the other decisions which we have considered under this topic.

In the effort to harmonize the statements it may be said with truth that in deciding cases which arose under the Fourteenth Amendment the court has not always been careful to specify the provision of the Fourteenth Amendment under which the case was decided; that the court has in some respects regarded the due process provision and the equal protection provision as almost interchangeable; and it may, therefore, be thought that the decisions may be harmonized by saying that discriminatory governmental action is forbidden by the equal protection provision rather than by the due process provision.

There is some force in this explanation of the decisions, but it is not sufficient. The decisions are also probably based in large measure upon an interpretation of the due process provision which if correct should apply to both the state and the federal governments. It may be said that the provision for due process of law is equivalent to a provision for the law of the land, that the law of the land must be a law which applies uniformly throughout the entire land, and that, therefore, discriminatory governmental action must be in violation of the due process provision.⁶⁹

214 U. S. 138, 149, 29 Sup. Ct. 560, 563, 53 L. ed. 941. Compare 13 Law Notes, 81, with 43 Am. L. Rev. 926.

⁶⁷ See note 1 in Chapter 3, *supra*.

⁶⁸ See note 6 in Chapter 3, *supra*.

⁶⁹ See argument of counsel in *Dartmouth College v. Woodward* (1819) 4 Wheat. 518, 581, 4 L. ed. 629; *McGehee, Due Process of Law*, 60, 61; Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 382, 383; Freund, *Police Power*, pp. 632, 633.

The weakness of such a contention lies simply in the fact that it has not been shown that for a law to be the law of the land it must apply uniformly throughout the jurisdiction.⁷⁰ And, of course, until that is shown the court is not justified in declaring governmental action unconstitutional upon any such ground.

Thus far the court has not applied to legislation the principle that governmental action which is discriminatory violates the due process provision. And while we have seen strong reasons for doubting whether that provision forbids such action by an administrative body, such action may at times be held illegal or unconstitutional upon other grounds. It may be illegal because inconsistent with legislation, or if based upon a broad grant of discretion that grant of discretion may be unconstitutional because it constitutes a delegation of legislative power. But we are now considering simply the question whether discriminatory governmental action is forbidden by the due process provision, and there does not seem to be a sufficient justification for saying that the court should hold that such action is forbidden by the requirement of due process of law.

CONSTITUTIONAL AND EXTRA-CONSTITUTIONAL RESTRAINTS.

Inconsistent positions taken.

92. In deciding cases which arose under the due process clauses the Supreme Court has at different times taken two positions concerning the powers of government

⁷⁰ See argument on "lex terrae" in *State v. —* (1794) 1 Hayw. (N. C.) 28, 32; Corwin, *ubi supra*, 24 Harv. L. Rev. at 476, note; *Missouri v. Lewis* (1879) 101 U. S. 22, 31, 32, 25 L. ed. 989; note 20 in Chapter 2, *supra*; note 17 in Chapter 5, *infra*.

which are unquestionably inconsistent with each other. According to one position the state legislatures over subject-matters not withdrawn from their control, and Congress over subject-matters entrusted to it, have all governmental powers which are not entrusted by the constitutions to other organs of government and which are not withdrawn from the control of those legislative bodies by other provisions of the constitutions. This position is supported by the vast weight of direct authority. We have already noted a number of the authorities,⁷¹ and we shall soon note further authorities in its support.

According to the other position, there are restraints which, although not contained in the constitutions, apply to all organs of government, there are rights which, although not supported by the constitutions, no organ of government may violate; and those restraints, or those rights, are to be ascertained by judicial action. That position is expressed in several ways, so that it will be necessary for us to observe the decisions and dicta under several heads, but there is the common thought which underlies those several lines of cases that there are fundamental rights, inalienable rights, which have an existence independent of any provision of the constitutions but which the courts may recognize and may compel all organs of government to observe. That thought furnishes the real basis of some of the decisions in cases which arise under the due process provision.

As we have already said, those two positions are unquestionably inconsistent with each other. And yet the court has given such inadequate attention to their inconsistency that each position has been expressed by the Supreme Court frequently, and in several cases, of which

⁷¹ Notes 10, 12, 13 in Chapter 2, *supra*.

Twining v. New Jersey⁷² may be cited as an instance, the two positions are even stated side by side in the same opinion.⁷³

⁷² (1908) 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97; see page 169, *supra*.

⁷³ See the quotation from the opinion in Twining v. New Jersey on p. 193, *infra*. With it compare the following quotation from the same opinion: "We prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and is of a nature that pertains to process of law, this court has declared it to be essential to due process of law:" 211 U. S. at 106, 29 Sup. Ct. at 22, 53 L. ed. at 109. "Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. . . . It is at best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient:" 211 U. S. at 113, 29 Sup. Ct. at 25, 53 L. ed. at 112. "Consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government. This idea has been many times expressed in differing words by this court, and it seems well to cite some expressions of it. The words due process of law 'were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.' Bank of Columbia v. Okely (1819) 4 Wheat. 235, 244, 4 L. ed. 559 (approved in *Hurtado v. California* (1884) 110 U. S. 516, 527, 4 Sup. Ct. 111, 292, 117, 28 L. ed. 232; *Leeper v. Texas* (1891) 139 U. S. 462, 468, 11 Sup. Ct. 577, 579, 35 L. ed. 225; *Scott v. McNeal* (1894) 154 U. S. 34, 45, 14 Sup. Ct. 1108, 1112, 38 L. ed. 896). 'This court has never attempted to define with precision the words "due process of law." . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' *Holden v. Hardy* (1898) 169 U. S. 366, 389, 18 Sup. Ct. 383, 387, 42 L. ed. 780. 'The same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' *In re Kemmler* (1890) 136 U. S. 436, 448, 10 Sup. Ct. 930, 934, 34 L. ed. 519. 'The limit of the full control which the state has in the proceedings

Power to declare governmental action unconstitutional.

93. The position that there are extra-constitutional restraints derives, of course, no support from those cases which sustain the power of the courts to declare the invalidity of governmental action which is clearly unconstitutional.

It is true that the Federal Constitution expressly forbids the courts to enforce provisions of the state laws and the state constitutions which conflict with the Federal Constitution, and that while there is no provision of that Constitution which necessarily requires the courts to decide for themselves whether federal legislative or executive action is compatible with the Constitution,⁷⁴ and

of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.' *West v. Louisiana* (1904) 194 U. S. 258, 263, 24 Sup. Ct. 650, 652, 48 L. ed. 965." See 211 U. S. at 101, 102, 29 Sup. Ct. at 20 21, 53 L. ed. at 107.

⁷⁴ Article VI, clause 2, which requires judges to ignore every provision of a state constitution or law which is in conflict with the supreme law of the land, necessarily requires them to decide the question of compatibility before enforcing the state constitution or law. But it does not seem that this clause either by itself or in connection with any other clause necessarily requires the courts to pass an independent judgment upon the compatibility of federal action to the Constitution. See Thayer, John Marshall, 61, 64, 65, 98; book review by Prof. Thayer in 7 Harv. L. Rev. 380; Thayer, Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 137, note, reprinted in Thayer, *Legal Essays*, 12, note. Compare Watson on the Constitution, 1168, 1180-1183, 1192; Coxe, *Judicial Power and Unconstitutional Legislation*, viii, 67, 272 et seq.; Meigs, *Some Recent Attacks on the American Doctrine of Judicial Power*, 40 Am. L. Rev. 660 et seq.; Hastings, *Is It Usurpation to Hold Void as Unconstitutional Laws?* 20 Green Bag, 453. Quaere, does "in pursuance thereof" mean merely "as a consequence of the formation of the new government" and thus assist in creating one obvious difference between laws and treaties or does it also create an additional difference between laws and treaties? See also preceding clause of Article VI; but compare Coxe, *ubi supra*, 316, as to the development of this clause in the Convention; and see Meigs, *ubi supra*, 662. On the bearing of other provisions of the Constitution see

while for some time there was room for doubt whether in the absence of an express provision to that effect in a constitution a court might refuse to enforce legislation which it considered clearly in conflict with the constitution,⁷⁵ nevertheless, since the decision in the case of *Marbury v. Madison* ⁷⁶ it has been settled law that the court may pass an independent judgment upon the constitutionality of legislation and refuse to enforce legislation which it considers clearly unconstitutional:⁷⁷ the courts do not regard

Corwin, *The Establishment of Judicial Review*, 9 Mich. L. Rev. 102, 119; Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 Mich. L. Rev. 616; Trickett, *The Great Usurpation*, 40 Am. L. Rev. 356; Pennoyer, *The Income Tax Decision*, 29 Am. L. Rev. 555, 559, 860.

⁷⁵ On the lack of unanimity on this subject about the time of the adoption of the Federal Constitution see Boudin, *Government by Judiciary*, 26 Pol. Sci. Quar. 238, 244 et seq., 257; Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 Mich. L. Rev. 616 et seq.; Corwin, *The Establishment of Judicial Review*, 9 Mich. L. Rev. 102; Thayer, *John Marshall*, 63, 66, 72; Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 132-134, 137, reprinted in Thayer, *Legal Essays*, 1, 5-7, 11; Willoughby on the Constitution, 5, 6; Beard, *The Supreme Court and the Constitution*, chap. 2, p. 113, note; Meigs, *The Relation of the Judiciary to the Constitution*, 19 Am. L. Rev. 175, 178 et seq.; Trickett, *The Great Usurpation*, 40 Am. L. Rev. 360, 366; Trickett, *Judicial Dispensation from Congressional Statutes*, 41 Am. L. Rev. 65; Coxe, *Judicial Power and Unconstitutional Legislation*, chaps. 20-28; Meigs, *Some Recent Attacks on the American Doctrine of Judicial Power*, 40 Am. L. Rev. 650; Cooley, *Constitutional Limitations*, 7th ed., 229, note; *Federalist*, No. 78; Pennoyer, *The Income Tax Decision*, 29 Am. L. Rev. 860; *An Early Constitutional Case in Massachusetts*, 7 Harv. L. Rev. 415; Elliott, *The Legislatures and the Courts*, 5 Pol. Sci. Quar. 231 et seq.; McClain, *Written and Unwritten Constitutions in the United States*, 6 Col. L. Rev. 69, 70; Clark, *The Supremacy of the Judiciary*, 17 Harv. L. Rev. 1; and see Pierce, *Federal Usurpation*, 200, 201. On the popular attitude toward the courts see also Boudin, *Government by Judiciary*, 26 Pol. Sci. Quar. 238, 248-250, 257, 263, 264; Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 132, note, 137, note, reprinted in Thayer, *Legal Essays*, 5, 11; Bryce, *American Commonwealth*, 3d ed., I, 501, 451-453; Roe, *Our Judicial Oligarchy*, 28; U. S. Constitution, Amendments V-VIII; and see Thayer, *John Marshall*, 65, 66, 104, 105; *Bill of Rights* (1688).

⁷⁶ (1803) 1 Cranch, 137, 2 L. ed. 60.

⁷⁷ The court in that case asserts a general right to refuse to enforce

as strictly binding upon them the interpretations which Congress must necessarily place upon grants of and restrictions upon legislative power before it legislates, as do the courts of continental Europe.⁷⁸

such legislation, although the decision might have been based on a narrower ground. "As this was a question of the constitutional grant of its own powers, it might have assumed the right to ignore any attempted lessening or augmenting of them, without claiming the larger right to interfere with the validity of acts of Congress which did not pertain to its own jurisdiction:" *Trickett, The Great Usurpation*, 40 *Am. L. Rev.* 369. See also *Ibid.* 375; *Coxe, Judicial Power and Unconstitutional Legislation*, 10, 20, 337; *Thayer, John Marshall*, 72 et seq.; *Bordwell, The Function of the Judiciary*, 7 *Col. L. Rev.* at 337; *Corwin, The Establishment of Judicial Review*, 9 *Mich. L. Rev.* 102, 292; *Beard, The Supreme Court and the Constitution*, 31, 33, 115, note; *Boudin, Government by Judiciary*, 26 *Pol. Sci. Quar.* 238, 250, 251, 254-256.

⁷⁸ On the extent to which judges at times regard previous decisions of the court upon constitutional questions as binding upon them see concurring opinion in *Dorr v. United States* (1904) 195 U. S. 138, 153, 24 Sup. Ct. 808, 814, 49 L. ed. 128; *New Y. C. & H. R. R. Co. v. Board of Chosen Freeholders* (1913) 227 U. S. 248, 261, 33 Sup. Ct. 269, 271, 57 L. ed. 499; *Twining v. New Jersey* (1908) 211 U. S. 78, 98, 99, 29 Sup. Ct. 14, 19, 53 L. ed. 97; with which consider *Lincoln, Inaugural Address* (1861); *Legal Tender Cases* (1870) 12 Wall. 457, 20 L. ed. 287; concurring opinions in *Butchers' U. Co. v. Crescent C. Co.* (1884) 111 U. S. 746, 4 Sup. Ct. 652, 28 L. ed. 585; dissenting opinion in *Abbott v. Beddingfield* (1899) 125 N. C. 256, 280, 34 S. E. 412, 419; *Collins, The Fourteenth Amendment and the States*, chap. 8; *Boudin, Government by Judiciary*, 26 *Pol. Sci. Quar.* 238, 267; *Goodnow, Social Reform and the Constitution*, 357; *Bowman, Congress and the Supreme Court*, 25 *Pol. Sci. Quar.* 20; *Shroder, The Doctrine of Stare Decisis—Its Application to Decisions Involving Constitutional Interpretation*, 58 *Cent. L. J.* 29; *Machen, The Elasticity of the Constitution*, 14 *Harv. L. Rev.* 202, 206, 207, 209; *Chamberlain, The Doctrine of Stare Decisis as Applied to Decisions of Constitutional Questions*, 3 *Harv. L. Rev.* 125; *Willoughby on the Constitution*, sec. 28; *Willoughby, The Supreme Court of the United States*, 76, 77; and also *Coudert, Certainty and Justice*, 14 *Yale L. J.* 364; *Whitney, The Doctrine of Stare Decisis*, 3 *Mich. L. Rev.* 89, 94 et seq.; *Ex parte Harding* (1911) 219 U. S. 363, 378, 31 Sup. Ct. 324, 329, 55 L. ed. 252; *Hertz v. Woodman* (1910) 218 U. S. 205, 212, 213, 30 Sup. Ct. 621, 622, 623, 54 L. ed. 1001; *Chicago, B. & Q. Ry. Co. v. United States* (1911) 220 U. S. 559, 577, 31 Sup. Ct. 612, 616, 55 L. ed. 582; *Ex parte Holman* (1908) 79 S. C. 9, 13, 60 S. E. 19, 21; *People v. Tompkins* (1906) 186 N. Y. 413, 79 N. E. 326, 12 L. R. A. N. S. 1081; *Vail v. Arizona* (1907) 207 U. S. 201, 205, 28 Sup.

General duty to enforce legislation.

94. But the cases in which the court declares that it may pass upon the constitutionality of the acts of other departments of government themselves recognize the duty of the courts to enforce legislation unless that legislation is, in the opinion of the courts,⁷⁹ unquestionably opposed to any view which may properly be taken of the Constitution.⁸⁰ The courts have no general veto power over leg-

Ct. 107, 108, 52 L. ed. 169; dissenting opinion in *Eakin v. Raub* (1825) 12 S. & R. (Pa.) 330, 346; dissenting opinion in *Standard Oil Co. v. United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502, 55 L. ed. 619.—As to the formation of independent opinions on constitutional questions see also *Marbury v. Madison* (1803) 1 Cranch, 137, 2 L. ed. 60; Thayer, *John Marshall*, 67, 98, 108; Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, reprinted with additional notes in Thayer, *Legal Essays*; Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 Mich. L. Rev. 629, 630; Trickett, *The Great Usurpation*, 40 Am. L. Rev. 374; Pennoyer, *The Income Tax Decision*, 29 Am. L. Rev. 557; Meigs, *The Relation of the Judiciary to the Constitution*, 19 Am. L. Rev. 194-199; dissenting opinion in *Abbott v. Beddingfield* (1899) 125 N. C. 256, 268, 272, 294, 34 S. E. 412, 415, 416, 424; dissenting opinion in *Eakin v. Raub* (1825) 12 S. & R. (Pa.) 330, 348, 351, 353, 356; Goodnow, *Social Reform and the Constitution*, 334, 335, 337, 340; Roe, *Our Judicial Oligarchy*, 26; Cooley, *Constitutional Limitations*, 7th ed., 228; Bryce, *American Commonwealth*, 3d ed., I, 244, 246, 268, 269; Pierce, *Federal Usurpation*, 200. The argument in *Clark*, *The Supremacy of the Judiciary*, 17 Harv. L. Rev. 17, 18, is entirely unconvincing.

⁷⁹ See Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 Mich. L. Rev. 624; Trickett, *Judicial Dispensation from Congressional Statutes*, 41 Am. L. Rev. at 86, 87; dissenting opinion in *Eakin v. Raub* (1825) 12 S. & R. (Pa.) 330, 349; editorial, *The Flexibility of Law*, 96 *The Outlook*, 848; Roe, *Our Judicial Oligarchy*, 11, 12, 13, 23, 50, 51, 73 et seq., 157, 164 et seq., 177. Compare Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, reprinted with additional notes in Thayer, *Legal Essays*; Laurel H. C. v. *San Francisco* (1910) 216 U. S. 358, 365, 31 Sup. Ct. 301, 302, 54 L. ed. 515.

⁸⁰ *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 8, 16, 29 Sup. Ct. 148, 150, 153, 53 L. ed. 371; *Allen v. St. Louis, I. M. & S. Ry. Co.* (1913) 230 U. S. 553, 560, 33 Sup. Ct. 1030, 1033, 57 L. ed. 1625; *Missouri Rate Cases*—*Knott v. Chicago, B. & Q. R. Co.* (1913) 230 U. S. 474, 501, 33 Sup. Ct. 975, 980, 981, 57 L. ed. 1571; *Minnesota Rate Cases*—*Simpson v. Shepard* (1913) 230 U. S. 352, 452, 453, 33 Sup. Ct. 729, 762, 57 L. ed.

isolation.⁸¹ The Convention of 1787 repeatedly and emphatically refused to place in the Constitution such a grant of power to the courts,⁸² and it is inconceivable that those who adopted the Constitution granted a similar power by implication.

Passing upon the wisdom or justice of governmental action.

95. The question of the propriety of legislation is not

1511; *San Diego L. & T. Co. v. National City* (1899) 174 U. S. 739, 754, 19 Sup. Ct. 804, 810, 43 L. ed. 1154; *Henderson B. Co. v. Henderson City* (1899) 173 U. S. 592, 615, 19 Sup. Ct. 553, 562, 43 L. ed. 823; *Sinking Fund Cases* (1878) 99 U. S. 700, 718, 25 L. ed. 496; *Legal Tender Cases* (1872) 12 Wall. 457, 531, 20 L. ed. 287; language of Washington, J., in *Ogden v. Saunders* (1827) 12 Wheat. 213, 270, 6 L. ed. 606; *State v. Atlantic C. L. R. Co.* (1912) 64 Fla., 60 So. 186; Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 138 et seq., reprinted in Thayer, *Legal Essays*; Thayer, John Marshall, 106, 108, 110; Patterson, *The United States and the States Under the Constitution*, 2d ed., p. 232; Willoughby on the Constitution, p. 20; Bordwell, *The Function of the Judiciary*, 7 Col. L. Rev. 337.—On the extent to which this principle is observed by the courts, see Seager, *The Attitude of American Courts Towards Restrictive Labor Laws*, 19 Pol. Sci. Quar. 599; Hand, *Due Process of Law and the Eight Hour Day*, 21 Harv. L. Rev. 495, 499; Collins, *The Fourteenth Amendment and the States*, 168-170; Boudin, *Government by Judiciary*, 26 Pol. Sci. Quar. 238; Dodd, *The Growth of Judicial Power*, 24 Pol. Sci. Quar. 193; Roe, *Our Judicial Oligarchy*, 30; White, *Government Control of Transportation Charges*, 38 Am. L. Reg. N. S. at 153, note 3; Martin, *Recent Federal Court Decisions Affecting State Laws Regulating Freight and Passenger Rates*, 21 Yale L. J. 117; and note 73 in Chapter 3, *supra*.

⁸¹ The opinion in *Marbury v. Madison* (1803) 1 Cranch, 137, 2 L. ed. 60, so assumes. See also *Muskrat v. United States* (1911) 219 U. S. 346, 357, 31 Sup. Ct. 250, 254, 55 L. ed. 246; Elliot's *Debates*, V, 151, 344, 347; Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 136 et seq., reprinted in Thayer, *Legal Essays*, 1, 11 et seq.; Thayer, John Marshall, chap. 5; discussion in *Dorman v. State* (1859) 34 Ala. 216, 232 et seq.; *McMurtrie, The Jurisdiction to Declare Void Acts of Legislation*, 32 Am. L. Reg. N. S. 1094, 1095, 1103; *McMurtrie, A Last Word on Constitutional Construction*, 33 Am. L. Reg. N. S. 506; Boudin, *Government by Judiciary*, 26 Pol. Sci. Quar. 238, 248; latter part of note 80, *supra*; notes 12, 13, *supra*.

⁸² See note 81, *supra*.

judicial in its nature. That question has been entrusted to other departments of government. The Supreme Court has declared repeatedly that it has no right to inquire into the wisdom or justice of acts by other organs of the federal government or by the states or their organs of government;⁸³ and some of those statements have been made

⁸³ See the especially strong language used in *McCray v. United States* (1904) 195 U. S. 27, 54-61, 24 Sup. Ct. 769, 776-778, 49 L. ed. 78, in the many opinions there quoted, and in *Atkin v. Kansas* (1903) 191 U. S. 207, 223, 24 Sup. Ct. 124, 128, 48 L. ed. 148; and also *Noble State Bank v. Haskell* (1911) 219 U. S. 575, 580, 31 Sup. Ct. 299, 300, 55 L. ed. 341; *Oceanic N. Co. v. Stranahan* (1909) 214 U. S. 320, 340, 29 Sup. Ct. 671, 676, 53 L. ed. 1013; *United States v. Delaware & H. Co.* (1909) 213 U. S. 366, 405, 29 Sup. Ct. 527, 535, 53 L. ed. 836; *Twining v. New Jersey* (1908) 211 U. S. 78, 106, 29 Sup. Ct. 14, 22, 53 L. ed. 97; *Hunter v. Pittsburgh* (1907) 207 U. S. 161, 176, 28 Sup. Ct. 40, 45, 52 L. ed. 151; *Lottery Case—Champion v. Ames* (1903) 188 U. S. 321, 363, 23 Sup. Ct. 321, 329, 330, 47 L. ed. 492; *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 512, 22 Sup. Ct. 95, 99, 46 L. ed. 298; *New Y. & N. E. R. Co. v. Bristol* (1894) 151 U. S. 556, 570, 14 Sup. Ct. 437, 441, 38 L. ed. 269; *Powell v. Pennsylvania* (1888) 127 U. S. 678, 686, 8 Sup. Ct. 992, 1257, 996, 32 L. ed. 253; *Purity E. & T. Co. v. Lynch* (1912) 226 U. S. 192, 201, 33 Sup. Ct. 44, 46, 57 L. ed. 184; *Red "C" O. M. Co. v. Board of Agriculture* (1912) 222 U. S. 380, 394, 395, 32 Sup. Ct. 152, 156, 56 L. ed. 240; *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107, 153, 154, 31 Sup. Ct. 342, 350, 55 L. ed. 389; *Brodnax v. Missouri* (1911) 219 U. S. 285, 293, 31 Sup. Ct. 238, 240, 55 L. ed. 219; *Shevlin-Carpenter Co. v. Minnesota* (1910) 218 U. S. 57, 70, 30 Sup. Ct. 663, 667, 54 L. ed. 930; *District of Columbia v. Brooke* (1909) 214 U. S. 138, 150, 29 Sup. Ct. 560, 563, 53 L. ed. 941; *Railroad Comm. of Louisiana v. Cumberland T. & T. Co.* (1909) 212 U. S. 414, 420, 29 Sup. Ct. 357, 360, 53 L. ed. 577; *Waters-Pierce Oil Co. v. Deselms* (1909) 212 U. S. 159, 174, 29 Sup. Ct. 270, 274, 53 L. ed. 453; *St. Louis, I. M. & S. Ry. Co. v. Taylor* (1908) 210 U. S. 281, 295, 28 Sup. Ct. 616, 621, 52 L. ed. 1061; *Armour P. Co. v. United States* (1908) 209 U. S. 56, 82, 28 Sup. Ct. 428, 435, 52 L. ed. 681; *Sauer v. New York* (1907) 206 U. S. 536, 547, 27 Sup. Ct. 686, 689, 51 L. ed. 1176; *Hennington v. Georgia* (1896) 163 U. S. 299, 304, 16 Sup. Ct. 1086, 1088, 41 L. ed. 166; *Metropolis T. Co. v. Chicago* (1913) 228 U. S. 61, 69, 33 Sup. Ct. 441, 443, 57 L. ed. 730; *Chicago, B. & Q. R. Co. v. McGuire* (1911) 219 U. S. 549, 569, 31 Sup. Ct. 259, 263, 55 L. ed. 328; *Louisville & N. R. Co. v. Mottley* (1911) 219 U. S. 467, 474, 31 Sup. Ct. 265, 267, 55 L. ed. 297; *Ling Su Fan v. United States* (1910) 218 U. S. 302, 311, 31 Sup. Ct. 21, 23, 54 L. ed. 1049; *Grenada L. Co. v. Mississippi* (1910) 217 U. S. 433, 441, 30 Sup. Ct. 535, 539, 54 L. ed. 826; *Weems v. United States* (1910) 217 U. S. 349, 379, 30 Sup. Ct. 544, 554,

in language which was decidedly vigorous. And, indeed, even if there were no constitutional objection to the mak-

54 L. ed. 793; *Southwestern Oil Co. v. Texas* (1910) 217 U. S. 114, 127, 30 Sup. Ct. 496, 501, 54 L. ed. 688; *Interstate Com. Comn. v. Illinois C. R. Co.* (1910) 215 U. S. 452, 470, 30 Sup. Ct. 155, 160, 54 L. ed. 280; *McLean v. Arkansas* (1909) 211 U. S. 539, 547, 548, 29 Sup. Ct. 206, 208, 53 L. ed. 315; *Employers' Liability Cases—Howard v. Illinois C. R. Co.* (1908) 207 U. S. 463, 492, 28 Sup. Ct. 141, 143, 52 L. ed. 297; *Heath & M. M. Co. v. Worst* (1907) 207 U. S. 338, 357, 28 Sup. Ct. 114, 120, 52 L. ed. 236; *Whitfield v. Aetna L. I. Co.* (1907) 205 U. S. 489, 495, 27 Sup. Ct. 578, 579, 51 L. ed. 894; *Patterson v. Colorado* (1907) 205 U. S. 454, 461, 27 Sup. Ct. 556, 557, 51 L. ed. 879; *St. Mary's F.-A. P. Co. v. West Virginia* (1906) 203 U. S. 183, 192, 27 Sup. Ct. 132, 135, 51 L. ed. 144; *Hooker v. Los Angeles* (1903) 188 U. S. 314, 320, 23 Sup. Ct. 395, 397, 47 L. ed. 487; *Patton v. Brady* (1902) 184 U. S. 608, 623, 22 Sup. Ct. 493, 498, 46 L. ed. 713; *L'Hote v. New Orleans* (1900) 177 U. S. 587, 597, 20 Sup. Ct. 791, 792, 44 L. ed. 899; *Ohio Oil Co. v. Indiana* (1900) 177 U. S. 190, 211, 20 Sup. Ct. 576, 585, 44 L. ed. 429; *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 173, 20 Sup. Ct. 336, 338, 44 L. ed. 417; *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 157, 17 Sup. Ct. 56, 62, 41 L. ed. 369; *County of Mobile v. Kimball* (1880) 102 U. S. 691, 704, 26 L. ed. 238; *Springer v. United States* (1880) 102 U. S. 586, 594, 26 L. ed. 253; *Ex parte Siebold* (1879) 100 U. S. 371, 393, 25 L. ed. 717; *Legal Tender Cases* (1872) 12 Wall. 457, 552, 20 L. ed. 287; discussion in the case of *Dorman v. State* (1859) 34 Ala. 216, 235; *West Virginia v. Dent* (1884) 25 W. Va. 1, 21, 22; *Boudin, Government by Judiciary*, 26 Pol. Sci. Quar. 238, 262; *Sedgwick, Construction of Statutory and Constitutional Law*, 2d ed., 154, 183 et seq.; 21 Harv. L. Rev. 495; 4 Harv. L. Rev. 386; 32 Am. L. Reg. N. S. 5, 596; 33 Am. L. Reg. N. S. 512; *McMurtrie, Observations on Mr. George Bancroft's Plea for the Constitution*, pp. 5, 7, 26; *Bryce, The American Commonwealth*, 3d ed., I, 253; and see *Willoughby, The Nature of the State*, 77, 85; *Blackstone, Commentaries*, I, *91; and notes 76 in Chapter 3, *supra*, and 119, *infra*. Compare citations at end of note 80, *supra*, on the extent to which this principle is observed by the courts; *Interstate Com. Comn. v. Union P. R. Co.* (1912) 222 U. S. 541, 547, 548, 32 Sup. Ct. 108, 111, 56 L. ed. 308; *Interstate Com. Comn. v. Illinois C. R. Co.* and *McLean v. Arkansas*, *supra*; *Michigan C. R. Co. v. Powers* (1906) 201 U. S. 245, 300, 26 Sup. Ct. 459, 465, 50 L. ed. 744; *United States v. Joint T. Assn.* (1898) 171 U. S. 505, 571, 19 Sup. Ct. 25, 32, 43 L. ed. 259; note 73 in Chapter 3, *supra*; notes 111-114, 117, 118, *infra*; and opinion of Chase, J., in *Calder v. Bull* (1798) 3 Dall. 386, 388, 1 L. ed. 648. Justice Chase, it will be remembered, was a justice who left the court without a quorum while he made political speeches, who even made such a speech to a grand jury, and whose conduct in the *Alien and Sedition* case has been severely criticized.

ing of such an inquiry by the court, the inconvenience of leaving the validity of a law in uncertainty for years and of allowing a court upon so indefinite a ground ⁸⁴ to decide retroactively long after its enactment that the law was void ab initio would constitute a very grave practical objection to such a course.⁸⁵

The Ninth Amendment.

96. Moreover, the declaration of the Ninth Amendment that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" merely provides against an erroneous inference from other parts of the Constitution.⁸⁶ It does not authorize courts to refuse to enforce legislation upon the ground that Congress has violated rights unnamed in the Constitution. And it has no bearing whatever upon state legislation.

⁸⁴ See *McMurtrie, The Jurisdiction to Declare Void Acts of Legislation*, 32 *Am. L. Reg. N. S.* 1108; with which compare *Pollock, The Law of Reason*, 2 *Mich. L. Rev.* 159, 173; *Pollock, The Expansion of the Common Law*, 4 *Col. L. Rev.* 171, 187.

⁸⁵ See *McMurtrie, A Last Word on Constitutional Construction*, 33 *Am. L. Reg. N. S.* 511, 512; *McMurtrie, Note on Constitutional Law*, 32 *Am. L. Reg. N. S.* 595; *Trickett, The Great Usurpation*, 40 *Am. L. Rev.* 362-365, 376; *Norton v. Shelby County* (1886) 118 *U. S.* 425, 442, 6 *Sup. Ct.* 1121, 1125, 30 *L. ed.* 178; *Smalley, Railroad Rate Control* (Publications of the American Economic Assn.) 114-117; *Knoxville v. Knoxville W. Co.* (1909) 212 *U. S.* 1, 16, 29 *Sup. Ct.* 148, 153, 53 *L. ed.* 371; *Collins, The Fourteenth Amendment and the States*, 132, 136, 154, 158; *Hadley, The Eleventh Amendment*, 66 *Cent. L. J.* 71, 76; *Ransom, Majority Rule and the Judiciary*, 62; *Cooley, Constitutional Limitations*, 7th ed., 259; *Bryce, American Commonwealth*, 3d ed., I, 250, 264; and also *Thayer, John Marshall*, 102 et seq., 109. Compare *McMurtrie, ubi supra*, 33 *Am. L. Reg. N. S.* 507.

⁸⁶ See *Annals of Congress*, I, 456; *Thorpe, Constitutional History of the United States*, II, 218; *The Federalist*, No. 84; *Story on the Constitution*, sec. 448.

Rule stated in *Twining v. New Jersey*.

97. But it is not necessary for us to go into a further consideration of the authorities in support of this position. The court unquestionably declared correctly when it said in *Twining v. New Jersey*,⁸⁷ "It must not be forgotten that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. The power of the people of the states to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said in *Hurtado v. California*.⁸⁸ We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the states as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the guise of interpreting the Constitution we must take care that we do not import into the discussion our own personal views of what would be wise, just and fitting rules of government to be adopted by a free people and confound them with constitutional limitations. The question before us is the meaning of a constitutional provision which forbids the states to deny to any person due process of law. In the decision

⁸⁷ (1908) 211 U. S. 78, 106, 107, 29 Sup. Ct. 14, 22, 23, 53 L. ed. 97. Compare expressions in that opinion quoted in note 73, *supra*.

⁸⁸ (1884) 110 U. S. 516, 535, 4 Sup. Ct. 111, 292, 121, 28 L. ed. 232. See also pp. 157, 158, *supra*.

of this question we have authority to take into account only those fundamental rights which are expressed in that provision.”

Extra-constitutional restraints and rights.

98. And yet in a number of other cases, as we have already pointed out,⁸⁹ there are expressions in favor of the recognition of extra-constitutional restraints and rights. It is quite probable that there is no case in which that position constitutes the only avowed ground for the decision.⁹⁰ Indeed, the Supreme Court itself has said recently that rarely if ever has it been unable to find some remedy consistent with the law for acts which violated natural justice.⁹¹ Yet the fact remains that in a number of in-

⁸⁹ See p. 183, *supra*.

⁹⁰ “It may be remarked here that the doctrine of declaring legislative acts void as being contrary to the constitution, was probably helped into existence by a theory which found some favor among our ancestors at the time of the Revolution, that courts might disregard such acts if they were contrary to the fundamental maxims of morality, or, as it was phrased, to the laws of nature. Such a doctrine was thought to have been asserted by English writers, and even by judges at times but was never acted on. It has been repeated here, as a matter of speculation, by our earlier judges, and occasionally by later ones; but in no case within my knowledge has it ever been enforced where it was the single and necessary ground of the decision, nor can it be, unless as a revolutionary measure.” Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *Harv. L. Rev.* 129, 133, reprinted in Thayer, *Legal Essays*, 1, 6, 7. See also notes to the above passage.

⁹¹ “Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property.” *Monongahela B. Co. v. United States* (1910) 216 U. S. 177, 195, 30 Sup. Ct. 356, 361, 54 L. ed. 435. See also Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 *Mich. L. Rev.* 643, where it is said, “Given a sufficient hardihood of purpose at the rack of exegesis, and any document, no matter what its fortitude, will eventually give forth the meaning required of it;” and the language of Harlan, J., when orally announcing his

stances the court speaks of restraints and rights which, in view of the history of some of the terms used and the conceptions involved in others of the terms, are clearly considered as existing regardless of constitutional provisions. And while the court upon some of those occasions speaks of restraints and rights which it designates in those terms as supported by the constitutions, it does not by the use of such language show that consistency exists between the basic idea that there are extra-constitutional restraints and rights which may be enforced against all organs of government and the other basic idea that some organs of government have all governmental powers except those which are denied to them by the constitutions.

Inalienable rights.

99. There are a few statements in approval of the theory of inalienable rights in opinions which are not very recent;⁹² and even in some of the more recent cases there

dissent from the decision in *Standard Oil Co. v. United States* (1911) printed in 68 *Legal Intelligencer*, p. 318, col. 4. And see 24 *Harv. L. Rev.* at 470, 471.

⁹² In *Cummings v. Missouri* (1866) 4 Wall. 277, 18 L. ed. 356, which was decided before the adoption of the Fourteenth Amendment, and in which an *ex post facto* law was declared unconstitutional, the court said, speaking by Justice Field, that the "theory upon which our political institutions rest is, that all men have certain inalienable rights:" 4 Wall. at 321, 18 L. ed. at 362. But in the *Slaughter House Cases* (1872) 16 Wall. 36, 21 L. ed. 394, which were decided after the adoption of the Fourteenth Amendment, while Justice Field reiterated his views concerning the existence of inalienable rights in a dissenting opinion in which three other justices concurred (16 Wall. at 96, 105, 110, 111, 21 L. ed. at 415, 418, 419) those views were rejected by a majority of the court; and in *Butchers' U. Co. v. Crescent C. Co.* (1884) 111 U. S. 746, 4 Sup. Ct. 652, 28 L. ed. 585, while similar views were expressed (111 U. S. at 756, 757, 762, 4 Sup. Ct. at 657, 660, 28 L. ed. at 591, 588, 589) they were expressed only in opinions which concurred in the judgment upon grounds which did not appeal to a majority of the court and the acceptance of which would have meant the overruling of the *Slaughter House* decision. A statement from one of those "concurring" opinions in the *Butchers' Union* case was, however,

are casual dicta in which it is assumed that there are inalienable rights.⁹³

Natural justice, natural rights.

100. There are some mild expressions in several other opinions in favor of judicial recognition of natural justice or natural rights as possessing authority superior to legislation,⁹⁴ although in still other opinions such superiority is denied.⁹⁵

referred to with approval in the opinion of the court in *Allgeyer v. Louisiana* (1897) 165 U. S. 578, 589, 17 Sup. Ct. 427, 431, 41 L. ed. 832, a case which we shall consider later—see pp. 245-248, *infra*. And see Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 366, 375; with which compare *Satterlee v. Matthewson* (1829) 2 Pet. 380, 413, 414, 7 L. ed. 458.

⁹³ *Frisbie v. United States* (1885) 157 U. S. 160, 165, 15 Sup. Ct. 586, 588, 39 L. ed. 657; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 29, 25 Sup. Ct. 358, 362, 49 L. ed. 643; *Twining v. New Jersey* (1908) 211 U. S. 78, 106, 110, 113, 29 Sup. Ct. 14, 22, 24, 25, 53 L. ed. 97. See also 211 U. S. at 101, 102, 29 Sup. Ct. at 20, 21, 53 L. ed. at 107, quoted in note 73, on pp. 184, 185, *supra*. Compare discussion on pp. 202, 203, *infra*.

⁹⁴ Dicta in *Holden v. Hardy* (1898) 169 U. S. 366, 390, 18 Sup. Ct. 383, 387, 42 L. ed. 780; *Turpin v. Lemon* (1902) 187 U. S. 51, 57, 60, 23 Sup. Ct. 20, 23, 24, 47 L. ed. 70; *Arndt v. Griggs* (1890) 134 U. S. 316, 321, 10 Sup. Ct. 557, 559, 33 L. ed. 918, of which the passage last cited may possibly express the thought, on which we shall not now comment, that specific provisions of the Constitution will be enforced literally but that a provision which the court considers less definite will be applied only against governmental actions which the court considers to be against natural justice. See also *Monongahela B. Co. v. United States* (1910) 216 U. S. 177, 195, 30 Sup. Ct. 356, 361, 54 L. ed. 435; *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U. S. 226, 236, 17 Sup. Ct. 581, 584, 41 L. ed. 979; *Hurtado v. California* (1884) 110 U. S. 516, 535, 4 Sup. Ct. 111, 292, 120, 28 L. ed. 232; *License Tax Cases* (1866) 5 Wall. 462, 469, 18 L. ed. 497; *Terrett v. Taylor* (1815) 9 Cranch, 43, 52, 3 L. ed. 650; language of Chase, J., in *Calder v. Bull* (1798) 3 Dall. 386, 388, 1 L. ed. 648; dissenting opinion in *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 598, 599, 26 Sup. Ct. 341, 352, 50 L. ed. 596; dissenting opinion in *Slaughter House Cases* (1872) 16 Wall. 36, 96, 21 L. ed. 394; "concurring" opinion in *Butchers' U. Co. v. Crescent C. Co.* (1884) 111 U. S. 746, 754, 4 Sup. Ct. 652, 659, 28 L. ed. 585.

⁹⁵ *New Y. & N. E. R. Co. v. Bristol* (1894) 151 U. S. 556, 570, 14 Sup. Ct. 437, 441, 38 L. ed. 269. And see language of Iredell, J., in *Calder v.*

Fundamental rights.

101. In cases which arose after the Spanish war there are suggestions that, while some of the provisions of the Federal Constitution are not in force in territory which is subject to the federal government but which has not been "incorporated" into the United States, yet in such territory even "where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."⁹⁶

And in other cases which arose in territory which is

Bull (1798) 3 Dall. 386, 398, 399, 1 L. ed. 648; Elliot's Debates, V, 344 et seq.; dissenting opinion in *Loan Assn. v. Topeka* (1875) 20 Wall. 655, 668, 22 L. ed. 455; language of author of opinion in *Loan Assn. v. Topeka* in dissenting opinion in *Hepburn v. Griswold* (1869) 8 Wall. 603, 638, 19 L. ed. 513 (the decision in *Hepburn v. Griswold* from which he dissented was overruled in the *Legal Tender Cases* (1870) 12 Wall. 457, 20 L. ed. 287, and the decision which he announced in *Loan Assn. v. Topeka* was somewhat explained by him in *Davidson v. New Orleans* (1877) 96 U. S. 97, 106, 24 L. ed. 616); quotation in note 90, *supra*; *Hedderich v. State* (1885) 101 Ind. 564, 566, 1 N. E. 47; *Dorman v. State* (1859) 34 Ala. 216, 232 et seq.; Black, *Constitutional Law*, 3d ed. p. 72; Dec. Dig., Const. Law, sec. 39; Bryce, *American Commonwealth*, 3d ed., I, 447; Patterson, *The United States and the States Under the Constitution*, 2d ed., p. 10; Sutherland, *Statutory Construction*, 2d ed., sec. 85; Cooley, *Constitutional Limitations*, 7th ed., 233; Sedgwick, *Construction of Statutory and Constitutional Law*, 2d ed., 154-159; McMurtrie, *The Jurisdiction to Declare Void Acts of Legislation*, 32 Am. L. Reg. N. S. 1108; McMurtrie, *A Last Word on Constitutional Construction*, 33 Am. L. Reg. N. S. 512.—On the theory of natural justice see also note 103, *infra*.

⁹⁶ "Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, though unexpressed, principles which are the basis of all free government which cannot be with impunity transcended. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not

unquestionably part of the United States there are expressions of which the precise meaning is doubtful but which may indicate the position that "fundamental rights" are as such inviolable;⁹⁷ although from the lan-

expressed in so many words in the Constitution:" from separate opinion in *Downes v. Bidwell* (1901) 182 U. S. 244, 290, 291, 21 Sup. Ct. 770, 788, 45 L. ed. 1088, by White, J., in which Shiras and McKenna, JJ., concurred and with which Gray, J., agreed in substance. The above language was quoted with apparent approval by Day, J., in the opinion of the court in *Dorr v. United States* (1904) 195 U. S. 138, 147, 24 Sup. Ct. 808, 812, 49 L. ed. 128. The statement of Bradley, J., in the *Mormon Church Case—Late Corporation of the Church of Jesus Christ v. United States* (1890) 136 U. S. 1, 44, 10 Sup. Ct. 792, 803, 34 L. ed. 478, that "Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its Amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions," is quoted with approval by Brown, J., in his separate opinion in *Downes v. Bidwell* (1901) 182 U. S. 244, 288, 21 Sup. Ct. 770, 780, 45 L. ed. 1088, and is also quoted in the opinion of the court in *Dorr v. United States* (1904) 195 U. S. 138, 146, 24 Sup. Ct. 808, 812, 49 L. ed. 128; see also opinion of the court in *Dorr v. United States* (1904) 195 U. S. 138, 148, 24 Sup. Ct. 808, 812, 49 L. ed. 128, separate opinions of Brown, J., in *Hawaii v. Mankichi* (1903) 190 U. S. 197, 218, 23 Sup. Ct. 787, 791, 47 L. ed. 1016; *Downes v. Bidwell* (1901) 182 U. S. 244, 282, 21 Sup. Ct. 770, 785, 45 L. ed. 1088; and opinion of court in *Knowlton v. Moore* (1900) 178 U. S. 41, 109, 20 Sup. Ct. 747, 774, 44 L. ed. 969, quoted in opinion last cited. Consider, however, the vigorous criticisms of the views expressed above in McClain, *Written and Unwritten Constitutions in the United States*, 6 Col. L. Rev. 69, 73, 79, 80; Patterson, *The United States and the States Under the Constitution*, 2d ed., p. 10; Pierce, *Federal Usurpation*, 228 et seq.; and also *Campbell v. Jackman Bros.* (1908) 140 Iowa, 475, 118 N. W. 755, 27 L. R. A. N. S. 288; *Ward L. Co. v. Henderson-White M. Co.* (1907) 107 Va. 626, 59 S. E. 476, 17 L. R. A. N. S. 324.

⁹⁷ In *United States v. Cruikshank* (1875) 92 U. S. 542, 554, 23 L. ed. 588, the court said that the Fourteenth Amendment "simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society." But this was a mere dictum. In *Knowlton v. Moore* (1900) 178 U. S. 41, 109, 20 Sup. Ct. 747, 774, 44 L. ed. 969, the court mentioned the contention that it could apply "inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so" but said that the facts of the case were not such as to require the court to consider that contention. In *Hurtado v. Cali-*

guage used in still other opinions it seems quite possible that usually if not always when the court says that the Fourteenth Amendment protects fundamental rights it

fornia (1884) 110 U. S. 516, 534, 535, 4 Sup. Ct. 111, 292, 120, 28 L. ed. 232, the court said that the provision for due process of law in the Fifth Amendment "refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reasoning, it refers to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure." A large part of this statement is repeated in *In re Kemmler* (1890) 136 U. S. 436, 448, 10 Sup. Ct. 930, 934, 34 L. ed. 519, and part of it which relates to the Fourteenth Amendment is repeated in *Twining v. New Jersey* (1908) 211 U. S. 78, 102, 29 Sup. Ct. 14, 21, 53 L. ed. 97, in such a connection that it is quite possible that it is given a meaning different from that which was originally intended. In other portions of the opinion in the *Hurtado* case the court assumed, as it has often done (see p. 116, *supra*), that the provision for due process of law, standing alone, has the same meaning in both the Fifth Amendment and the Fourteenth Amendment, and in the passage quoted the court uses the expression "by parity of reason." It is, therefore, quite probable that the court referred to "the fundamental principles of liberty and justice" merely for rhetorical effect and that it did not seriously intend to declare that the provision in the Fourteenth Amendment possesses a scope wider than that which the court in the passage quoted declares to be the scope of the provision in the Fifth Amendment. In *Howard v. Kentucky* (1906) 200 U. S. 164, 173, 26 Sup. Ct. 189, 191, 50 L. ed. 421, the court said, "It may be admitted that the words 'due process of law,' as used in the Fourteenth Amendment, protect fundamental rights." See also *American L. Co. v. Zeiss* (1911) 219 U. S. 47, 66, 31 Sup. Ct. 200, 207, 55 L. ed. 82; *Carroll v. Greenwich I. Co.* (1905) 199 U. S. 401, 410, 26 Sup. Ct. 66, 67, 50 L. ed. 246; *Backus v. Fort S. U. D. Co.* (1898) 169 U. S. 557, 576, 18 Sup. Ct. 445, 452, 42 L. ed. 853; *Twining v. New Jersey* (1908) 211 U. S. 78, 101, 102, 106, 110, 29 Sup. Ct. 14, 20, 22, 24, 53 L. ed. 97 (with which compare 211 U. S. at 107, 29 Sup. Ct. at 23, 53 L. ed. at 109); the concession simply for argument in *McCray v. United States* (1904) 195 U. S. 27, 63, 64, 24 Sup. Ct. 769, 779, 780, 49 L. ed. 78; "concurring" opinion in *Butchers' U. Co. v. Crescent C. Co.* (1884) 111 U. S. 746, 759, 4 Sup. Ct. 652, 661, 662, 28 L. ed. 585; dissenting opinions in *Slaughter House Cases* (1872) 16 Wall. 36, 87, 95, 106, 114, 116, 21 L. ed. 394.

means merely that in interpreting provisions which are couched in general language it may regard the maxim "de minimis non curat lex."⁹⁸

⁹⁸ In *Watson v. Maryland* (1910) 218 U. S. 173, 177, 30 Sup. Ct. 644, 646, 54 L. ed. 987, the court said, "The federal courts can only interfere when fundamental rights guaranteed by the Federal Constitution are violated in the enactment of such statutes." In *Ballard v. Hunter* (1907) 204 U. S. 241, 262, 27 Sup. Ct. 261, 269, 51 L. ed. 461, it said, "The laws of a state come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights. A law must be framed and judged of in consideration of the practical affairs of man." In *Rogers v. Peck* (1905) 199 U. S. 425, 434, 26 Sup. Ct. 87, 89, 50 L. ed. 256, the court said, "It is only where fundamental rights, specially secured by the Federal Constitution, are invaded, that such interference is warranted," and this position was cited in *Franklin v. South Carolina* (1910) 218 U. S. 161, 165, 30 Sup. Ct. 640, 641, 54 L. ed. 980. In *Brown v. New Jersey* (1899) 175 U. S. 172, 175, 20 Sup. Ct. 77, 78, 44 L. ed. 119, the court said that the state has full control over the procedure in its courts both in civil and criminal cases, "subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution," and this statement was repeated with approval in *West v. Louisiana* (1904) 194 U. S. 258, 263, 24 Sup. Ct. 650, 652, 48 L. ed. 965; *Waters-Pierce Oil Co. v. Texas* (1909) 212 U. S. 86, 107, 29 Sup. Ct. 220, 225, 53 L. ed. 417. If the language just quoted may be interpreted as suggested in the text, no objection can be made to the position of the court, but the expressions in those opinions are quite objectionable if they are on a par with the suggestions contained in the dicta in *Lawton v. Steele* (1894) 152 U. S. 133, 140, 14 Sup. Ct. 499, 502, 38 L. ed. 385, that "An act of the legislature which has for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained, unless it is plainly violative of the Constitution or subversive of private rights," and in *Halter v. Nebraska* (1907) 205 U. S. 34, 45, 27 Sup. Ct. 419, 423, 51 L. ed. 696, that "It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order and well-being of the people. Before this court can hold the statute void it must say that and, in addition, adjudge that it violates rights secured by the Constitution of the United States. We cannot so say and cannot so adjudge;" and with the language of Field, J., dissenting, in *Slaughter House Cases* (1872) 16 Wall. 36, 87, 21 L. ed. 394.—On the subject of this note in general see also other statements in *West v. Louisiana* (1904) 194 U. S. 258, 263, 24 Sup. Ct. 650, 652, 48 L. ed. 965; and also *Allen v. Georgia* (1897) 166 U. S. 138, 140, 141, 17 Sup. Ct. 525, 526, 41 L. ed. 949; *Wilson v. North Carolina* (1898) 169 U. S. 586, 594, 18 Sup. Ct. 435, 438, 42 L. ed. 865. Compare sec. 110, *infra*; notes 17, 22 in Chapter 5, *infra*.

"Essential nature of all free governments."

102. The court has also said that upon all organs of government there are limitations "which grow out of the essential nature of all free governments."⁹⁹

⁹⁹ *Madisonville T. Co. v. St. Bernard M. Co.* (1905) 196 U. S. 239, 251, 252, 25 Sup. Ct. 251, 256, 49 L. ed. 462; *Loan Assn. v. Topeka* (1874) 20 Wall. 655, 662, 663, 22 L. ed. 455 (where the declaration was made in spite of an able and unanswerable dissenting opinion from Clifford, J.; see also the language of the author of the opinion in *Loan Assn. v. Topeka* in dissenting in *Hepburn v. Griswold* (1869) 8 Wall. 603, 638, 19 L. ed. 513; the decision in *Hepburn v. Griswold* from which he dissented was overruled in the *Legal Tender Cases* (1870) 12 Wall. 457, 20 L. ed. 287, and the decision which he announced in *Loan Assn. v. Topeka* was somewhat explained by him in *Davidson v. New Orleans* (1877) 96 U. S. 97, 105, 24 L. ed. 616). See also *Terrett v. Taylor* (1815) 9 Cranch, 43, 50, 51, 52, 3 L. ed. 650, a case which, it will be noted, came from a lower federal court and not from a state court, but where the opinion should have referred simply to the impairment of contract clause; dictum in *Holden v. Hardy* (1898) 169 U. S. 366, 389, 18 Sup. Ct. 383, 387, 42 L. ed. 780; the concession simply for argument in *McCray v. United States* (1904) 195 U. S. 27, 63, 24 Sup. Ct. 769, 779, 49 L. ed. 78; suggestion in *Giozza v. Tiernan* (1893) 148 U. S. 657, 661, 13 Sup. Ct. 721, 723, 37 L. ed. 599 (with which suggestion compare language of author of that opinion in *McPherson v. Blacker* (1892) 146 U. S. 1, 25, 13 Sup. Ct. 3, 7, 36 L. ed. 869; *New Y. & N. E. R. Co. v. Bristol* (1894) 151 U. S. 556, 570, 14 Sup. Ct. 437, 441, 38 L. ed. 269); dictum in *Hurtado v. California* (1893) 110 U. S. 516, 535, 4 Sup. Ct. 111, 292, 120, 28 L. ed. 232 (discussed in note 97, *supra*); dictum in *Wilkinson v. Leland* (1829) 2 Pet. 627, 656-658, 7 L. ed. 542; separate opinion of Chase, J., in *Calder v. Bull* (1798) 3 Dall. 386, 388, 1 L. ed. 648; suggestion in *Fletcher v. Peck* (1810) 6 Cranch, 87, 135, 136, 3 L. ed. 162. The suggestion last cited is explained in *Satterlee v. Matthewson* (1829) 2 Pet. 380, 413, 414, 7 L. ed. 458, where, after saying that a state law which divested rights which had been vested by law, but which did not impair the obligation of any contract, would not violate the Constitution of the United States, the court pointed out that the suggestion in *Fletcher v. Peck* must be considered simply as relating to the state constitution, which the court might interpret in a case which, like *Fletcher v. Peck*, came to it from a federal court and not from a state court.—With the citations in this note compare language of Iredell, J., in *Calder v. Bull* (1798) 3 Dall. 386, 398, 1 L. ed. 648; *Dorman v. State* (1859) 34 Ala. 216, 232 et seq.; Black, *Constitutional Law*, 3d ed., p. 72, 2d ed., pp. 63, 64; Patterson, *The United States and the States Under the Constitution*, 2d ed., p. 10; Boudin, *Government by Judiciary*, 26 Pol. Sci. Quar. 238, 265 et seq.; Cooley, *Constitutional Limitations*, 7th ed., 237-239; McClain, Un-

Discussion on inalienable rights, etc.

103. The statements concerning inalienable rights to which we have referred follow the language of a broad assertion of general principle which is made at the outset of the Declaration of Independence. But the assertion of such a general principle in the Declaration of Independence does not show that the courts may declare that legislation is void because it violates what the courts may determine to be inalienable rights, for the Declaration is not a part of the Constitution of the United States,¹⁰⁰ and even if it were part of that Constitution it would be going far to say that the general statement of the Declaration of Independence that men possess inalienable rights should be given a weight which the court re-

written Constitutions in the United States, 15 Harv. L. Rev. 531; Story on the Constitution, 5th ed., II, 568, note; Dale, Implied Limitations Upon Legislative Power, 24 Am. Bar. Assn. Proc. 294, 315-319; separate opinion of Knox, J., in *Sharpless v. Mayor of Philadelphia* (1853) 21 Pa. St. 147, 186, 187.—There is a dictum in *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 29, 25 Sup. Ct. 358, 362, 49 L. ed. 643, that "There is, of course, a sphere within which an individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will." But, of course, it cannot be successfully contended that in all free governments in which there are written constitutions the courts may interfere to enforce the provisions of those constitutions. And even in the United States, where the courts do enforce, with some exceptions, the provisions of the written constitutions, the mere fact that a constitution is written is immaterial apart from the contents of that constitution, unless, indeed, we may say that "Given a sufficient hardihood of purpose at the rack of exegesis, and any document, no matter what its fortitude, will eventually give forth the meaning required of it:" 7 Mich. L. Rev. 643.

100 Yet the language of Bradley, J., dissenting, in *Slaughter House Cases* (1872) 16 Wall. 36, 120, 21 L. ed. 394; concurring, in *Butchers' U. Co. v. Crescent C. Co.* (1884) 111 U. S. 746, 762, 4 Sup. Ct. 652, 657, 28 L. ed. 586, suggests that it was his opinion that our modern legislative bodies are restrained even by some of the old English statutes. Compare Beard, *The Supreme Court and the Constitution*, chap. 4, as showing the relation of the Constitution to the Declaration of Independence.

fuses¹⁰¹ to give to the general statements in the Preamble to that Constitution which was framed in 1787. The statements concerning inalienable rights are, therefore, in the same category as those concerning natural justice, those concerning the possession of fundamental rights which are not expressed in the constitutions and those concerning rights which are said to grow out of the essential nature of all free governments.

As to all such statements, and most if not all of them are merely dicta,¹⁰² it is sufficient to say that the premises upon which they are based have been abandoned by thoughtful men for over a century,¹⁰³ that those statements are against the vast weight of direct authority, and that the court has not attempted to support those statements by any discussion of principle.

Scope of governmental authority.

104. The Supreme Court has also said that the due

¹⁰¹ *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 22, 25 Sup. Ct. 358, 359, 49 L. ed. 643.

¹⁰² See, however, discussions in sections 104-106, *infra*, of decisions of which some may be in reality, though not avowedly, based upon such grounds.

¹⁰³ On the theory of natural justice see note 95, *supra*, and *Lee v. Bude & T. J. Ry. Co.* (1871) L. R. 6 C. P. 576, 582; *Dicey, The Law of the Constitution*, 7th ed., 59; *Holland, Elements of Jurisprudence*, 10th ed., 36, 37; *Huxley, Methods and Results Essays*, essay entitled "Natural Rights and Political Rights"; *Ritchie, Natural Rights*; *Salmond, The Law of Nature*, 11 *Law Quar. Rev.* 121; *Bryce, Studies in History and Jurisprudence*, II, essay entitled "The Law of Nature"; *Pollock, The Expansion of the Common Law*, 109, 121; *Pollock, The History of the Law of Nature*, 1 *Col. L. Rev.* 17, 2 *Col. L. Rev.* 131; *Pollock's Maine's Ancient Law*, chap. 3; *Pollock, The Law of Reason*, 2 *Mich. L. Rev.* at 168, 169; book reviews, 26 *Law Quar. Rev.* 173, 167, 168; *Willoughby, The Nature of the State*, chap. 5. Consider also the discussion in *Pound, Common Law and Legislation*, 21 *Harv. L. Rev.* 383; *Corwin, The Establishment of Judicial Review*, 9 *Mich. L. Rev.* 102, 115, 306; *Boudin, Government by Judiciary*, 26 *Pol. Sci. Quar.* 238, 265 et seq.

process clause of the Fourteenth Amendment prohibits acts which are beyond the scope of governmental authority.¹⁰⁴

This position we must carefully distinguish from the position which was taken by the court when it decided that the clause of the Fourteenth Amendment prohibits interference with property over which the state has no jurisdiction, as where the federal government has exclusive control over the property,¹⁰⁵ or where the situs of

¹⁰⁴ See dicta in *Cunnius v. Reading School Dist.* (1906) 198 U. S. 458, 469, 471, 476, 25 Sup. Ct. 721, 724, 725, 727, 49 L. ed. 1125; *Smiley v. Kansas* (1905) 196 U. S. 447, 456, 25 Sup. Ct. 289, 291, 29 L. ed. 546; and also *Fletcher v. Peck* (1810) 6 Cranch, 87, 135, 3 L. ed. 162; *Missouri P. Ry. Co. v. Humes* (1885) 115 U. S. 512, 520, 6 Sup. Ct. 110, 112, 29 L. ed. 463; *Lochner v. New York* (1905) 198 U. S. 45, 56, 25 Sup. Ct. 539, 542, 543, 49 L. ed. 937; *Lawton v. Steele* (1894) 152 U. S. 133, 137, 14 Sup. Ct. 499, 501, 38 L. ed. 385; *Adair v. United States* (1908) 208 U. S. 161, 174, 175, 28 Sup. Ct. 277, 280, 52 L. ed. 436; *American L. Co. v. Zeiss* (1911) 219 U. S. 47, 66, 31 Sup. Ct. 200, 207, 55 L. ed. 82; *Interstate Com. Comm. v. Illinois C. R. Co.* (1910) 215 U. S. 452, 470, 30 Sup. Ct. 155, 160, 54 L. ed. 280; *McLean v. Arkansas* (1909) 211 U. S. 539, 548, 29 Sup. Ct. 206, 208, 53 L. ed. 315; *National Ex. Bank v. Wiley* (1904) 195 U. S. 257, 270, 25 Sup. Ct. 70, 75, 49 L. ed. 184; *Howard v. Kentucky* (1906) 200 U. S. 164, 173, 26 Sup. Ct. 189, 191, 50 L. ed. 421; *Campbell v. California* (1906) 200 U. S. 87, 95, 26 Sup. Ct. 182, 185, 50 L. ed. 382 (the last of which arose under the equal protection provision). Compare Shattuck, *The True Meaning of the Term "Liberty,"* 4 Harv. L. Rev. 369, 375, 376, 380, 386; *McMurtrie, The Jurisdiction to Declare Void Acts of Legislation*, 32 Am. L. Reg. N. S. 1007, 1008; authorities in notes 10, 12, 13 in Chapter 2, *supra*, 146, *infra*.

¹⁰⁵ *Green B. & M. C. Co. v. Patten P. Co.* (1898) 172 U. S. 58, 82, 19 Sup. Ct. 97, 106, 43 L. ed. 364 (1899) 173 U. S. 179, 19 Sup. Ct. 316, 43 L. ed. 658. But that clause is not violated by state taxation of distilled spirits in bonded warehouses: *Hannis D. Co. v. Baltimore* (1910) 216 U. S. 285, 30 Sup. Ct. 326, 54 L. ed. 482; *Thompson v. Kentucky* (1908) 209 U. S. 340, 28 Sup. Ct. 533, 52 L. ed. 822; *Carstairs v. Cochran* (1904) 193 U. S. 10, 24 Sup. Ct. 318, 48 L. ed. 596. Compare *Western U. T. Co. v. Chiles* (1909) 214 U. S. 274, 29 Sup. Ct. 613, 53 L. ed. 994, where it was held that in view of Art. I, sec. 8, par. 17, of the Federal Constitution a state law relating to the delivery of telegrams could not constitutionally be applied to delivery within a navy yard, the land for which had been ceded by the state to the federal government.—In the Corporation Tax

property on which a tax is based is within another state,¹⁰⁶ or where a defendant against whom a judgment in personam is sought is not within the jurisdiction of the

Cases, *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107, 152, 158, 172, 31 Sup. Ct. 342, 349, 352, 357, 55 L. ed. 389, the court decided that "the mere fact that the business taxed is done in pursuance of authority granted by a state in the creation of private corporations does not exempt it from the exercise of federal authority to levy excise taxes upon such privileges."

¹⁰⁶ *Buck v. Beach* (1907) 206 U. S. 392, 27 Sup. Ct. 712, 51 L. ed. 1106; *Union R. T. Co. v. Kentucky* (1905) 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150 (where two justices dissented on this point); *Delaware, L. & W. R. Co. v. Pennsylvania* (1905) 198 U. S. 341, 25 Sup. Ct. 669, 49 L. ed. 1077; *Louisville & J. F. Co. v. Kentucky* (1903) 188 U. S. 385, 23 Sup. Ct. 463, 47 L. ed. 513; *Western U. T. Co. v. Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190, 54 L. ed. 355; *Pullman Co. v. Kansas* (1910) 216 U. S. 56, 30 Sup. Ct. 232, 54 L. ed. 88; *Ludwig v. Western U. T. Co.* (1910) 216 U. S. 146, 30 Sup. Ct. 280, 54 L. ed. 423. See also *Selliger v. Kentucky* (1909) 213 U. S. 200, 29 Sup. Ct. 449, 53 L. ed. 761; *Metropolitan L. I. Co. v. New Orleans* (1907) 205 U. S. 395, 399, 27 Sup. Ct. 499, 500, 51 L. ed. 853; *People ex rel. New Y. C. & H. R. R. Co. v. Miller* (1906) 202 U. S. 584, 26 Sup. Ct. 714, 50 L. ed. 1155; and the following tax cases, some of which did not arise under the due process provision: *Meyer v. Wells, Fargo & Co.* (1912) 223 U. S. 298, 32 Sup. Ct. 218, 56 L. ed. 445; *Ayer & Lord T. Co. v. Kentucky* (1906) 202 U. S. 409, 26 Sup. Ct. 679, 50 L. ed. 1082; *Fargo v. Hart* (1904) 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761; *New Y., L. E. & W. R. Co. v. Pennsylvania* (1894) 153 U. S. 628, 646, 14 Sup. Ct. 952, 958, 38 L. ed. 846; *Ashley v. Ryan* (1894) 153 U. S. 436, 440, 446, 14 Sup. Ct. 865, 866, 868, 38 L. ed. 773; *State Tax on Foreign-held Bonds* (1872) 15 Wall. 300, 319, 325, 326, 21 L. ed. 179; *Railroad Co. v. Jackson* (1868) 7 Wall. 262, 268, 19 L. ed. 88 (where two justices dissented); *United States v. Rice* (1819) 4 Wheat. 246, 4 L. ed. 562. With cases in this note compare *Selover, Bates & Co. v. Walsh* (1912) 226 U. S. 112, 33 Sup. Ct. 69, 57 L. ed. 146; *Keeney v. New York* (1912) 222 U. S. 525, 32 Sup. Ct. 105, 56 L. ed. 299; *Southern P. Co. v. Kentucky* (1911) 222 U. S. 63, 32 Sup. Ct. 13, 56 L. ed. 96; *Liverpool & L. & G. Ins. Co. v. Board of Assessors* (1911) 221 U. S. 346, 31 Sup. Ct. 550, 55 L. ed. 762; *Orient Ins. Co. v. Board of Assessors* (1911) 221 U. S. 358, 31 Sup. Ct. 554, 55 L. ed. 769; *Hannis D. Co. v. Baltimore* (1910) 216 U. S. 285, 30 Sup. Ct. 326, 54 L. ed. 482; *Central R. Co. v. Jersey City* (1908) 209 U. S. 473, 28 Sup. Ct. 592, 52 L. ed. 896; *Hatch v. Reardon* (1907) 204 U. S. 152, 158, 27 Sup. Ct. 188, 189, 51 L. ed. 415; 19 Harv. L. Rev. 206; 20 Harv. L. Rev. 138, 313.—In *Hammond P. Co. v. Arkansas* (1909) 212 U. S. 322, 342, 343, 29 Sup. Ct. 370, 376, 377, 53 L. ed. 530, the court decided that in spite of the due process clause of the Fourteenth Amendment a state may forbid a corporation to do business within its limits because of acts done beyond the

state.¹⁰⁷ The court is not saying that where one government or one organ of government possesses sole authority over a subject that power may not be lawfully exercised by another government or another organ of government.¹⁰⁸ It declares broadly that the acts referred to are beyond the scope of governmental authority.

So also the position which we have noted is not analogous to that which was taken by the court when it said that the due process provision prohibits acts by state courts in matters over which the state has not given them jurisdiction.¹⁰⁹

state. See, along the same line, *United States v. Nord Deutscher Lloyd* (1912) 223 U. S. 512, 32 Sup. Ct. 244, 56 L. ed. 531. With these two cases compare *American B. Co. v. United F. Co.* (1909) 213 U. S. 347, 29 Sup. Ct. 511, 53 L. ed. 826. In *Olmsted v. Olmsted* (1910) 216 U. S. 386, 30 Sup. Ct. 292, 54 L. ed. 530; *Fall v. Eastin* (1909) 215 U. S. 1, 29 Sup. Ct. 148, 54 L. ed. 65; *Brown v. Fletcher's Estate* (1908) 210 U. S. 82, 28 Sup. Ct. 702, 52 L. ed. 966, it was held that the full faith and credit clause did not require the courts of one state to recognize acts by another state which sought to affect the title to property but which acts were beyond the jurisdiction of the latter state. See also *Nielsen v. Oregon* (1909) 212 U. S. 315, 29 Sup. Ct. 383, 53 L. ed. 528; *Strassheim v. Daily* (1911) 221 U. S. 280, 31 Sup. Ct. 558, 55 L. ed. 735; *Atchison, T. & S. F. Ry. Co. v. Sowers* (1909) 213 U. S. 55, 29 Sup. Ct. 397, 53 L. ed. 695; *The Hamilton* (1907) 207 U. S. 398, 28 Sup. Ct. 133, 52 L. ed. 264, which dealt with the question of extra-territoriality but which did not arise under the due process provision.

¹⁰⁷ *Old W. M. L. Assn. v. McDonough* (1907) 204 U. S. 8, 27 Sup. Ct. 236, 51 L. ed. 345; *Pennoyer v. Neff* (1877) 95 U. S. 714, 722, 24 L. ed. 565. See also *Brown v. Fletcher's Estate* (1908) 210 U. S. 82, 28 Sup. Ct. 702, 52 L. ed. 966. Compare *Commercial M. A. Co. v. Davis* (1909) 213 U. S. 245, 29 Sup. Ct. 445, 53 L. ed. 782.

¹⁰⁸ See discussion in *Pennoyer v. Neff* (1877) 95 U. S. 714, 722, 24 L. ed. 565; *The Hamilton* (1907) 207 U. S. 398, 28 Sup. Ct. 133, 52 L. ed. 264; *Strassheim v. Daily* (1911) 221 U. S. 280, 31 Sup. Ct. 558, 55 L. ed. 735; *Bacon v. Illinois* (1913) 227 U. S. 504, 33 Sup. Ct. 299, 57 L. ed. 615; and also note 2 in Chapter 2, *supra*.

¹⁰⁹ *Scott v. McNeal* (1894) 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. ed. 896, explained in *Cunnius v. Reading School Dist.* (1905) 198 U. S. 458, 475, 25 Sup. Ct. 721, 726, 49 L. ed. 1125. (It seems, however, that the court

Nor is the court restricting its assertion of power even to a claim that it may declare state legislation invalid upon the ground that in the opinion of the court it is not authorized by a general grant of legislative power in a state constitution, upon which point it seems clear that the court would hold that the decision of the state court was conclusive.¹¹⁰

The assertion can be nothing less than that the due process provision empowers the court to declare that the state itself cannot do some acts which are not forbidden by other provisions of the Federal Constitution, and that it cannot do those acts in any manner or by any procedure whatever. And the court has never shown any justification for taking such a position.

|

REASONABLENESS.

Unreasonable or arbitrary governmental action.

105. The court upon several occasions has decided that the due process clauses authorize the court to declare that actions by other organs of government which the court

would hold that the state could not have authorized the state court to do just as it did in this case.) See also 19 Harv. L. Rev. 535; *Savings Bank v. Weeks* (1906) 103 Md. 601, 64 Atl. 295, 6 L. R. A. N. S. 690; *In re Kelly* (1890) 46 Fed. 653; *Western U. T. Co. v. Myatt* (1899) 98 Fed. 335 (to be read in the light of *Dreyer v. Illinois* (1902) 187 U. S. 71, 84, 23 Sup. Ct. 28, 32, 47 L. ed. 79); *Valentina v. Mercer* (1906) 201 U. S. 131, 26 Sup. Ct. 368, 50 L. ed. 693; *Howard v. Kentucky* (1906) 200 U. S. 164, 173, 26 Sup. Ct. 189, 191, 50 L. ed. 421. Compare *Lent v. Tillson* (1891) 140 U. S. 316, 331, 11 Sup. Ct. 825, 831, 35 L. ed. 419; *Rawlins v. Georgia* (1906) 201 U. S. 638, 26 Sup. Ct. 560, 50 L. ed. 899; *Atlantic C. L. R. Co. v. North Carolina Corp. Comm.* (1907) 206 U. S. 1, 27 Sup. Ct. 585, 51 L. ed. 933; *Consolidated R. Co. v. Vermont* (1908) 207 U. S. 541, 28 Sup. Ct. 178, 52 L. ed. 327.

¹¹⁰ See pp. 132, 133, *supra*.

considers unreasonable¹¹¹ or arbitrary¹¹² are unconstitutional even though they do not violate any procedural requirements of the Constitution; and in addition to these cases in which governmental action was declared invalid, there are a number of other cases in which the court has either said or suggested that such action would violate

¹¹¹ In *Eubank v. Richmond* (1912) 226 U. S. 137, 33 Sup. Ct. 76, 57 L. ed. 156, that was one of the grounds upon which the court declared unconstitutional an ordinance relating to the establishment of a building line upon request of owners of two-thirds of the abutting property. The decision seems to be clearly unreasonable. In *Adair v. United States* (1908) 208 U. S. 161, 28 Sup. Ct. 277, 52 L. ed. 436, that was one of the grounds upon which the court declared unconstitutional a federal statute which forbade interstate carriers and their officials to discharge employees because of membership in labor organizations. In *Lochner v. New York* (1905) 198 U. S. 45, 25 Sup. Ct. 539, 49 L. ed. 937, a law which limited the number of hours of labor in bakeries and in *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858, a state law which limited the charge for mileage tickets were declared unconstitutional upon that ground. See also pp. 226-228, *infra*, for decisions on the reasonableness of maximum rates of charges.

¹¹² *Adair v. United States* (1908) 208 U. S. 161, 175, 180, 28 Sup. Ct. 277, 280, 283, 52 L. ed. 436; *Lochner v. New York* (1905) 198 U. S. 45, 62, 25 Sup. Ct. 539, 545, 49 L. ed. 937; *Missouri P. Ry. Co. v. Tucker* (1913) 230 U. S. 340, 351, 33 Sup. Ct. 961, 964, 57 L. ed. 1507. In *Dobbins v. Los Angeles* (1904) 195 U. S. 223, 25 Sup. Ct. 18, 49 L. ed. 169, reversing the decision of the highest state court, it declared that an ordinance which changed the territorial limits within which gas works might be erected was, under the circumstances disclosed, arbitrary and discriminatory and, therefore, in violation of the due process provision. In saying that the ordinance was arbitrary it is quite possible that the court meant that there was not a sufficient reason for its enactment. In *Scott v. McNeal* (1894) 154 U. S. 34, 45, 14 Sup. Ct. 1108, 1112, 38 L. ed. 896, where a state court which had jurisdiction to administer the estates of decedents exceeded that jurisdiction and administered the estate of a person who was in fact alive, the Supreme Court quoted with approval the statement in an earlier opinion that the due process provision was intended "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." The Supreme Court case in which the language quoted first appeared related simply to a question of procedure. See remarks on that language in 24 *Harv. L. Rev.* 476, note. And see discussion of *Scott v. McNeal* in *Cunnius v. Reading School Dist.* (1905) 198 U. S. 458, 25 Sup. Ct. 721, 49 L. ed. 1125.

the due process provision if unreasonable¹¹³ or arbitrary. The latter word is apparently used in the instances which

¹¹³ *American L. Co. v. Zeiss* (1911) 219 U. S. 47, 66, 67, 31 Sup. Ct. 200, 207, 55 L. ed. 82; *House v. Mayes* (1911) 219 U. S. 270, 284, 285, 31 Sup. Ct. 234, 237, 55 L. ed. 213; *Brodnax v. Missouri* (1911) 219 U. S. 285, 292, 293, 31 Sup. Ct. 238, 239, 55 L. ed. 219; *Griffith v. Connecticut* (1910) 218 U. S. 563, 569, 31 Sup. Ct. 132, 133, 54 L. ed. 1151; *Ling Su Fan v. United States* (1910) 218 U. S. 302, 311, 31 Sup. Ct. 21, 23, 54 L. ed. 1049; *Watson v. Maryland* (1910) 218 U. S. 173, 178, 30 Sup. Ct. 644, 646, 54 L. ed. 987; *Lemieux v. Young* (1909) 211 U. S. 489, 496, 29 Sup. Ct. 174, 176, 53 L. ed. 295; *Atlantic C. L. R. Co. v. North Carolina Corp. Comm.* (1907) 206 U. S. 1, 20, 27 Sup. Ct. 585, 592, 51 L. ed. 933; *Schmidinger v. Chicago* (1913) 226 U. S. 578, 588, 33 Sup. Ct. 182, 184, 57 L. ed. 364; *Missouri P. Ry. Co. v. Kansas* (1910) 216 U. S. 262, 274, 275, 276, 30 Sup. Ct. 330, 334, 335, 54 L. ed. 472; *West C. S. R. Co. v. People* (1906) 201 U. S. 506, 524, 526, 26 Sup. Ct. 518, 522, 524, 50 L. ed. 845; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 592, 593, 26 Sup. Ct. 341, 350, 50 L. ed. 596; *Cunnius v. Reading School Dist.* (1905) 198 U. S. 458, 476, 25 Sup. Ct. 721, 727, 49 L. ed. 1125; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 28, 29, 25 Sup. Ct. 358, 362, 49 L. ed. 643; *Wisconsin, M. & P. R. Co. v. Jacobson* (1900) 179 U. S. 287, 296, 297, 301, 21 Sup. Ct. 115, 118, 119, 120, 43 L. ed. 1194; *Gundling v. Chicago* (1900) 177 U. S. 183, 188, 20 Sup. Ct. 633, 635, 44 L. ed. 725; *Holden v. Hardy* (1898) 169 U. S. 366, 392, 395, 398, 18 Sup. Ct. 383, 388, 389, 390, 42 L. ed. 780; *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220. See also *Lindsley v. Natural C. G. Co.* (1911) 220 U. S. 61, 77, 31 Sup. Ct. 337, 340, 55 L. ed. 369; *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 112, 31 Sup. Ct. 186, 188, 55 L. ed. 112; *Mobile, J. & K. C. R. Co. v. Turnipseed* (1910) 219 U. S. 35, 43, 31 Sup. Ct. 136, 138, 55 L. ed. 78; *Williams v. Arkansas* (1910) 217 U. S. 79, 30 Sup. Ct. 493, 54 L. ed. 673; *Welch v. Swasey* (1909) 214 U. S. 91, 105, 108, 29 Sup. Ct. 567, 570, 571, 53 L. ed. 923; *People v. Van de Carr* (1905) 199 U. S. 552, 563, 26 Sup. Ct. 144, 147, 50 L. ed. 305; *Gardner v. Michigan* (1905) 199 U. S. 325, 332, 26 Sup. Ct. 106, 109, 50 L. ed. 212; *California R. Co. v. Sanitary R. Works* (1905) 199 U. S. 306, 320, 26 Sup. Ct. 100, 104, 50 L. ed. 204; *Quong Wing v. Kirken-dall* (1912) 223 U. S. 59, 62, 32 Sup. Ct. 192, 193, 56 L. ed. 350; *Mutual L. Co. v. Martell* (1911) 222 U. S. 225, 234, 32 Sup. Ct. 74, 75, 56 L. ed. 175; *New York v. Hesterberg* (1908) 211 U. S. 31, 39, 29 Sup. Ct. 10, 12, 53 L. ed. 75; *Hanover Nat. Bk. v. Moyses* (1902) 186 U. S. 181, 192, 22 Sup. Ct. 857, 862, 46 L. ed. 1113; and cases on maximum rates of charges, discussed on pp. 226-228, 231, 232, *infra*. Compare Red "C" O. M. Co. v. Board of Agriculture (1912) 222 U. S. 380, 394, 32 Sup. Ct. 152, 156, 56 L. ed. 240; *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107, 158, 167, 169, 31 Sup. Ct. 342, 352, 355, 356, 55 L. ed. 389; *Chicago, B. & Q. R. Co. v. McGuire* (1911) 219 U. S. 549, 569, 31 Sup. Ct. 259, 263, 55 L. ed. 328; *Patton v. Brady* (1902) 184 U. S. 608, 623, 22 Sup. Ct. 493, 498, 46 L. ed. 713.

are cited¹¹⁴ as meaning oppressive or unjust or not based upon a sufficient reason.

¹¹⁴ *Barrett v. Indiana* (1913) 229 U. S. 26, 29, 33 Sup. Ct. 692, 693, 57 L. ed. 1050; *Interstate Com. Comm. v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 91, 33 Sup. Ct. 185, 186, 187, 57 L. ed. 431; *Missouri P. Ry. Co. v. Kansas* (1910) 216 U. S. 262, 274, 275, 276, 30 Sup. Ct. 330, 334, 335, 54 L. ed. 472; *New York v. Hesterberg* (1908) 211 U. S. 31, 39, 29 Sup. Ct. 10, 12, 53 L. ed. 75; *Atlantic C. L. R. Co. v. North Carolina Corp. Comm.* (1907) 206 U. S. 1, 20, 27 Sup. Ct. 585, 592, 51 L. ed. 933; *Schmidinger v. Chicago* (1913) 226 U. S. 578, 588, 33 Sup. Ct. 182, 184, 57 L. ed. 364; *Interstate Com. Comm. v. Union P. R. Co.* (1912) 222 U. S. 541, 547, 553, 32 Sup. Ct. 108, 111, 113, 56 L. ed. 308; *German A. Ins. Co. v. Hale* (1911) 219 U. S. 307, 316, 31 Sup. Ct. 246, 248, 55 L. ed. 229; *Brodnax v. Missouri* (1911) 219 U. S. 285, 292, 293, 31 Sup. Ct. 238, 239, 55 L. ed. 219; *House v. Mayes* (1911) 219 U. S. 270, 284, 285, 31 Sup. Ct. 234, 237, 55 L. ed. 213; *American L. Co. v. Zeiss* (1911) 219 U. S. 47, 66, 31 Sup. Ct. 200, 207, 55 L. ed. 82; *Ling Su Fan v. United States* (1910) 218 U. S. 302, 311, 31 Sup. Ct. 21, 23, 54 L. ed. 1049; *Kidd, D. & P. Co. v. Musselman G. Co.* (1910) 217 U. S. 461, 473, 30 Sup. Ct. 606, 607, 54 L. ed. 839; *McLean v. Arkansas* (1909) 211 U. S. 539, 547, 548, 29 Sup. Ct. 206, 208, 53 L. ed. 315; *Lemieux v. Young* (1909) 211 U. S. 489, 496, 29 Sup. Ct. 174, 176, 53 L. ed. 295; *West C. S. R. Co. v. People* (1906) 201 U. S. 506, 524, 526, 26 Sup. Ct. 522, 524, 50 L. ed. 845; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 592, 593, 26 Sup. Ct. 341, 350, 50 L. ed. 596; *People v. Van de Carr* (1905) 199 U. S. 552, 563, 26 Sup. Ct. 144, 147, 50 L. ed. 305; *California R. Co. v. Sanitary R. Works* (1905) 199 U. S. 306, 320, 26 Sup. Ct. 100, 104, 50 L. ed. 204; *Cunnius v. Reading School Dist.* (1905) 198 U. S. 458, 476, 25 Sup. Ct. 721, 727, 49 L. ed. 1125; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 28, 25 Sup. Ct. 358, 362, 49 L. ed. 643; *Otis v. Parker* (1903) 187 U. S. 606, 608, 23 Sup. Ct. 168, 169, 47 L. ed. 323; *Lawton v. Steele* (1894) 152 U. S. 133, 140, 14 Sup. Ct. 499, 502, 38 L. ed. 385; *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. Ct. 1064, 30 L. ed. 220. And see *Metropolis T. Co. v. Chicago* (1913) 228 U. S. 61, 69, 70, 33 Sup. Ct. 441, 443, 57 L. ed. 730; *Quong Wing v. Kirkendall* (1912) 223 U. S. 59, 62, 32 Sup. Ct. 192, 193, 56 L. ed. 350; *Mutual L. Co. v. Martell* (1911) 222 U. S. 225, 234, 32 Sup. Ct. 74, 75, 56 L. ed. 175; *Chicago, R. I. & P. Ry. Co. v. Arkansas* (1911) 219 U. S. 453, 465, 466, 31 Sup. Ct. 275, 279, 55 L. ed. 290; *Bailey v. Alabama* (1911) 219 U. S. 219, 238, 31 Sup. Ct. 145, 150, 55 L. ed. 191; *Hodgson v. Vermont* (1897) 168 U. S. 262, 272, 18 Sup. Ct. 80, 83, 42 L. ed. 461; *Missouri P. Ry. Co. v. Humes* (1885) 115 U. S. 512, 519, 6 Sup. Ct. 110, 112, 29 L. ed. 463; *Barbier v. Connolly* (1885) 113 U. S. 27, 31, 5 Sup. Ct. 357, 359, 28 L. ed. 923; *United States v. Cruikshank* (1875) 92 U. S. 542, 554, 23 L. ed. 588; *Hammond P. Co. v. Arkansas* (1909) 212 U. S. 322, 341, 346, 347, 29 Sup. Ct. 370, 376, 378, 53 L. ed. 530; *Welch v. Swasey* (1909) 214 U. S. 91, 105, 29 Sup. Ct. 567,

This position requires careful examination, for it is inconsistent with numerous decisions by the court that it has no constitutional right to inquire into the wisdom or justice of acts by other organs of the federal government or by the states or their organs of government;¹¹⁵ and if followed out it would place almost unlimited power in the hands of the federal judiciary, and under it the Fourteenth Amendment would radically change the relations which before its adoption existed between the state and federal governments and between both governments and the people.¹¹⁶

570, 53 L. ed. 923; and the following cases which deal with the question of procedure: *Bank of Columbia v. Okely* (1819) 4 Wheat. 235, 244, 4 L. ed. 559; *Caldwell v. Texas* (1891) 137 U. S. 692, 697, 698, 11 Sup. Ct. 224, 226, 34 L. ed. 816; *Kentucky U. Co. v. Kentucky* (1911) 219 U. S. 140, 161, 31 Sup. Ct. 171, 180, 55 L. ed. 137; *Mobile, J. & K. C. R. Co. v. Turnipseed* (1910) 219 U. S. 35, 43, 31 Sup. Ct. 136, 138, 55 L. ed. 78; concurring opinion in *Davidson v. New Orleans* (1877) 96 U. S. 97, 107, 24 L. ed. 616. On *Bank of Columbia v. Okely*, supra, see 24 Harv. L. Rev. 476, note. With the cases in the present note compare *Flint v. Stone Tracy Co.* (1911) 220 U. S. 107, 158, 31 Sup. Ct. 342, 352, 55 L. ed. 389.

¹¹⁵ See notes 83, supra, and 76 in Chap. 3, supra.

¹¹⁶ The court has declared, in cases cited in note 51, supra, that the Amendment did not bring about such a change.—As was said by Knox, J., in his separate opinion in *Sharpless v. Mayor of Philadelphia* (1853) 21 Pa. St. 147, 186, 187, "There is, to my mind, great danger in recognizing the existence of a power in the judiciary to annul legislative action, without some fixed rule by which such power is to be measured. Our opinions are so diversified and varied, that what to one mind may seem clearly right and proper, to another will appear to be fraught with imminent danger. If we have not a certain standard by which to test the constitutionality of legislative enactments; if each judge is to be governed by his own convictions of what is right or otherwise, I fear that restraints upon judicial, rather than upon legislative action, will be demanded by a people ever jealous of the accumulation of power in the hands of the few." Clifford, J., dissenting, said in *Loan Assn. v. Topeka* (1874) 20 Wall. 655, 669, 22 L. ed. 455, "Courts cannot nullify an act of the state legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts

Unnecessary governmental action.

106. The court has also said or suggested in several cases that it may pass upon the necessity for legislative¹¹⁷ or administrative¹¹⁸ action, although such statements and suggestions also are clearly inconsistent with the position which the court has taken in other cases.¹¹⁹

sovereign over both the constitution and the people, and convert the government into a judicial despotism." See also Boudin, *Government by Judiciary*, 26 *Pol. Sci. Quar.* 238, especially latter part of that article, and note 73 in Chapter 3, *supra*.

¹¹⁷ *Lochner v. New York* (1905) 198 U. S. 45, 56, 25 Sup. Ct. 539, 543, 49 L. ed. 937; *Lawton v. Steele* (1894) 152 U. S. 133, 137, 14 Sup. Ct. 499, 501, 38 L. ed. 385; *House v. Mayes* (1911) 219 U. S. 270, 282, 284, 285, 31 Sup. Ct. 234, 236, 237, 55 L. ed. 213; *Welch v. Swasey* (1909) 214 U. S. 91, 105, 29 Sup. Ct. 567, 570, 53 L. ed. 923; *Brodnax v. Missouri* (1911) 219 U. S. 285, 292, 293, 31 Sup. Ct. 238, 239, 55 L. ed. 219; *Engel v. O'Malley* (1911) 219 U. S. 128, 136, 31 Sup. Ct. 190, 192, 55 L. ed. 128; *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 113, 31 Sup. Ct. 186, 189, 55 L. ed. 112; *California R. Co. v. Sanitary R. Works* (1905) 199 U. S. 306, 318, 26 Sup. Ct. 100, 103, 50 L. ed. 204; *Gardner v. Michigan* (1905) 199 U. S. 325, 332, 333, 26 Sup. Ct. 106, 109, 50 L. ed. 212; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 28, 25 Sup. Ct. 358, 362, 49 L. ed. 643; *Gundling v. Chicago* (1900) 177 U. S. 183, 188, 20 Sup. Ct. 633, 635, 44 L. ed. 725.

¹¹⁸ *Washington ex rel. Oregon R. & N. Co. v. Fairchild* (1912) 224 U. S. 510, 32 Sup. Ct. 535, 56 L. ed. 863.

¹¹⁹ In *McCulloch v. Maryland* (1819) 4 Wheat. 316, 423, 4 L. ed. 579, without reference to the Fifth Amendment, Marshall, C. J., says concerning legislation by Congress, which differs from state legislatures in that it has only powers expressly or impliedly granted, that "where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." And in *Oceanic Nav. Co. v. Stranahan* (1909) 214 U. S. 320, 340, 29 Sup. Ct. 671, 676, 53 L. ed. 1013, the court, by White, J., speaks of "the assumption that it is within the competency of judicial authority to control legislative action as to subjects over which there is complete legislative authority, on the theory that there was no necessity calling for the exertion of legislative power. . . . The constitutional right of Congress to enact such legislation is the sole measure by which its validity is to be determined by the courts. The suggestion that if this view be applied grave abuses may arise from the mistaken or wrongful exertion by the legislative department of its authority but intimates

Nature of opinions upon these subjects.

107. In support of these positions of the court there is very little reasoning expressed in the opinions, but from citations and quotations in a number of those opinions it seems clear that the court is often basing such decisions under the due process clauses upon other lines of decision which the court deems to be either directly in point or else analogous. We shall, therefore, inquire into the bearing of those other lines of decision upon the questions under consideration.

Relevancy of decisions on reasonableness of ordinances.

108. Let us first note that the fact that English courts and those which applied state law ¹²⁰ have declared in-

that if the legislative power be permitted its full sway within its constitutional sphere, harm and wrong will follow, and therefore it behooves the judiciary to apply a corrective by exceeding its own authority. But as was pointed out in *Cary v. Curtis* (1845) 3 How. 236, 11 L. ed. 576, and as has been often since emphasized by this court (*McCray v. United States* (1904) 195 U. S. 27, 24 Sup. Ct. 769, 49 L. ed. 78), the proposition but mistakenly assumes that the courts can alone be safely entrusted with power, and that hence it is their duty to unlawfully exercise prerogatives which they have no right to exert, upon the assumption that wrong must be done to prevent wrong being accomplished." See also *District of Columbia v. Brooke* (1909) 214 U. S. 138, 150, 29 Sup. Ct. 560, 563, 53 L. ed. 941; *The Lottery Case—Champion v. Ames* (1903) 188 U. S. 321, 358, 23 Sup. Ct. 321, 327, 328, 47 L. ed. 492; *United States v. Chandler-Dunbar Co.* (1913) 229 U. S. 53, 62, 33 Sup. Ct. 667, 672, 57 L. ed. 1063; *McDermott v. Wisconsin* (1913) 228 U. S. 115, 128, 33 Sup. Ct. 431, 433, 57 L. ed. 754; *Hoke v. United States* (1913) 227 U. S. 308, 323, 33 Sup. Ct. 281, 284, 57 L. ed. 523; *Mutual L. Co. v. Martell* (1911) 222 U. S. 225, 233, 234, 32 Sup. Ct. 74, 75, 56 L. ed. 175; *Weems v. United States* (1910) 217 U. S. 349, 378, 30 Sup. Ct. 544, 553, 54 L. ed. 793; *Twining v. New Jersey* (1908) 211 U. S. 78, 106, 29 Sup. Ct. 14, 22, 53 L. ed. 97; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comn. of Wisconsin* (1908) 136 Wis. 146, 160, 116 N. W. 905, 910, 17 L. R. A. N. S. 821, 829; and cases cited in note 83, supra, and note 213, infra. Compare *United States v. Joint T. Assn.* (1898) 171 U. S. 505, 571, 19 Sup. Ct. 25, 32, 43 L. ed. 259, where the statement of the court is inconclusive; and note in 17 L. R. A. 838.

¹²⁰ I. e., state courts and also federal courts when the latter acquired jurisdiction by reason of the diverse citizenship of the parties.

valid ordinances which the municipalities were not expressly empowered to make which the courts considered unreasonable¹²¹ does not justify the Federal Supreme Court in inquiring into the reasonableness of an ordinance upon appeal from a state court,¹²² nor does it by itself show anything as to the bearing of the due process provision upon legislation. It has not been shown, by reference to those clauses or to any other clauses, that the men who adopted the Federal Constitution sought to place Congress in the same relation to the federal judiciary as municipal governments stood towards the local courts;¹²³ and they certainly did not place the state legislatures in that position; for while Congress is somewhat like such municipal governments in that it possesses only

¹²¹ See Dillon, *Municipal Corporations*, 5th ed., sec. 589 et seq.; McQuillin, *Municipal Ordinances*, sec. 181 et seq.; McQuillin, *Municipal Corporations*, sec. 724 et seq.; *Paul v. Gloucester County* (1888) 50 N. J. L. 585, 600, 15 Atl. 272, 279, 1 L. R. A. 86; *New O. & N. W. R. Co. v. Vidalia* (1906) 117 La. 560, 42 So. 139, and also *People v. Daniels* (1889) 6 Utah, 288, 292, 293, 22 Pac. 159, 160, 5 L. R. A. 444, which points out that territories are in the same position as municipalities in this respect. It seems that originally the rule was a qualification to the admission that municipalities possessed implied powers, and was not a limitation concerning the propriety of exercises of express powers, and that the extent to which the rule is at present frequently applied in this country is due to later usurpations of power by the courts.

¹²² *Railroad Co. v. Richmond* (1877) 96 U. S. 521, 528, 24 L. ed. 734. Consider, however, the character of the citations in *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 28, 25 Sup. Ct. 358, 362, 49 L. ed. 643; and see *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220; and *dissenting* opinion in *Slaughter House Cases* (1872) 16 Wall. 36, 108, 21 L. ed. 394. Acts by municipalities which are in excess of authority from the state do not for that reason violate the due process provision: *Owensboro W. Co. v. Owensboro* (1906) 200 U. S. 38, 26 Sup. Ct. 249, 50 L. ed. 361. The United States Supreme Court declares that it is its duty to follow the interpretations which have been given to the state constitutions and the state statutes by the state courts: see notes 45-47 in Chapter 3, *supra*.

¹²³ Had they done so, it seems that the rule would have related only to the *implied* powers of Congress. On the power of Congress see also note 13 in Chapter 2, *supra*.

powers which have been bestowed upon it, expressly or impliedly,¹²⁴ a state legislature has all powers not denied to it by the federal or state constitution,¹²⁵ and the state itself, in adopting a constitution, has all powers not denied to it by the Federal Constitution.¹²⁶

It is possible that the decisions concerning the reasonableness of ordinances may show by way of analogy that the appropriate courts may pass upon the reasonableness of administrative regulations under some circumstances, depending upon the terms of the grant of power to the administrative organ. But those decisions do not seem to have any bearing whatever upon state or federal legislation.

Reasonable exercises of police power.

109. The court has also said that in view of the due process provision a governmental action cannot be a valid exercise of the police power unless it is reasonable;¹²⁷ and in reaching this conclusion it has referred to cases

¹²⁴ See note 11 in Chapter 2, *supra*.

¹²⁵ See note 10 in Chapter 2, *supra*.

¹²⁶ See *City of New York v. Miln* (1837) 11 Pet. 102, 139, 9 L. ed. 648; *Martin v. Hunter's Lessee* (1816) 1 Wheat. 304, 325, 4 L. ed. 97; *Sturges v. Crowninshield* (1819) 4 Wheat. 122, 192, 193, 4 L. ed. 529; Sutherland, *Notes on the United States Constitution*, 677.

¹²⁷ *Eubank v. Richmond* (1912) 226 U. S. 137, 144, 33 Sup. Ct. 76, 77, 57 L. ed. 156; *Lochner v. New York* (1905) 198 U. S. 45, 53, 56, 25 Sup. Ct. 539, 541, 543, 49 L. ed. 937; *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 689, 691, 19 Sup. Ct. 565, 567, 568, 43 L. ed. 858; *House v. Mayes* (1911) 219 U. S. 270, 282, 31 Sup. Ct. 234, 236, 55 L. ed. 213; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 592, 593, 26 Sup. Ct. 341, 350, 50 L. ed. 596; *New York v. Hesterberg* (1908) 211 U. S. 31, 39, 29 Sup. Ct. 10, 12, 53 L. ed. 75. See also *McLean v. Arkansas* (1909) 211 U. S. 539, 547, 29 Sup. Ct. 206, 208, 53 L. ed. 315; *Welch v. Swasey* (1909) 214 U. S. 91, 105, 29 Sup. Ct. 567, 570, 53 L. ed. 923; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 25, 28, 25 Sup. Ct. 358, 361, 362, 49 L. ed. 643; *Gundling v. Chicago* (1900) 177 U. S. 183, 188, 20 Sup. Ct. 633, 635, 44 L. ed. 725; *Holden v. Hardy* (1898) 169 U. S. 366, 392, 395, 398, 18 Sup. Ct. 383, 388, 389, 390, 42 L. ed. 780; *Lawton v. Steele* (1894) 152 U.

which arose under other provisions of the Constitution and in which it had considered the occasion for governmental action in order to determine therefrom whether such action were within the police power of a state.¹²⁸ Such references to decisions under other provisions of the Constitution are in point if the term "police power" is used in the same sense in all cases.¹²⁹

Meaning of term "police power."

110. In the cases which arose under other provisions of the Constitution the term "police power" is apparently used to denote a power the existence of which limits the scope of provisions of the Federal Constitution. The court recognizes the fact that it cannot carry out a constitution "with mathematical nicety to logical extremes."¹³⁰ It does not always interpret stringently the

S. 133, 137, 14 Sup. Ct. 499, 501, 38 L. ed. 385; *German A. Ins. Co. v. Hale* (1911) 219 U. S. 307, 316, 31 Sup. Ct. 246, 248, 55 L. ed. 229.

¹²⁸ Note the references in the following cases which arose under the due process provision to cases which were decided under other provisions of the Constitution: *Lawton v. Steele* (1894) 152 U. S. 133, 137, 14 Sup. Ct. 499, 501, 38 L. ed. 385; *German A. Ins. Co. v. Hale* (1911) 219 U. S. 307, 316, 317, 31 Sup. Ct. 246, 248, 55 L. ed. 229; *California R. Co. v. Sanitary R. Works* (1905) 199 U. S. 306, 318, 319, 26 Sup. Ct. 100, 103, 50 L. ed. 204; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 25, 28, 25 Sup. Ct. 358, 361, 362, 49 L. ed. 643; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 584, 585, 26 Sup. Ct. 341, 346, 50 L. ed. 596.

¹²⁹ But see *Hand*, *The Commodities Clause and the Fifth Amendment*, 22 *Harv. L. Rev.* 250, 259; *Blayney*, *The Term "Police Power,"* 59 *Cent. L. J.* 486, 489.

¹³⁰ "You cannot carry a constitution out with mathematical nicety to logical extremes. If you could, we should never have heard of the police power:" *Paddell v. New York* (1908) 211 U. S. 446, 450, 29 Sup. Ct. 139, 140, 53 L. ed. 275. See also *Noble State Bk. v. Haskell* (1911) 219 U. S. 104, 110, 31 Sup. Ct. 186, 187, 55 L. ed. 112; *Hudson C. W. Co. v. McCarter* (1908) 209 U. S. 349, 355, 357, 28 Sup. Ct. 529, 531, 532, 52 L. ed. 828; *Danforth v. Groton W. Co.* (1901) 178 *Mass.* 472, 476, 477, 59 *N. E.* 1033, 1034; *Dunbar v. Boston & P. R. Co.* (1902) 181 *Mass.* 383, 63 *N. E.* 916. *Holmes, J.*, speaking for himself, said in *Interstate C. S. Ry. Co. v.*

limitations upon state action which are contained in the Federal Constitution.¹³¹ Instead of so doing, it inquires into the character of the legislation and it says

Commonwealth (1907) 207 U. S. 79, 86, 87, 28 Sup. Ct. 26, 27, 52 L. ed. 111, "I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power. The obverse way of stating this power in the sense in which I am using the phrase would be that constitutional rights like others are matters of degree and that the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some at least of the purposes of wholesome legislation." See also cases there cited; notes 17, 22 in Chapter 5, *infra*; note 98, *supra*.

¹³¹ The court, in cases arising under the impairment of contract clause, has declared that, in spite of supposed contracts, a state may enact legislation to secure the safety or to protect the health or the morals of its citizens: *Texas & N. O. R. Co. v. Miller* (1911) 221 U. S. 408, 414, 31 Sup. Ct. 534, 535, 55 L. ed. 789; *Northern P. Ry. Co. v. State* (1908) 208 U. S. 583, 596, 597, 598, 28 Sup. Ct. 341, 345, 346, 52 L. ed. 630; and cases cited there and in *Patterson, The United States and the States Under the Constitution*, 2d ed., p. 178. And the court for a long time held, and to some extent still holds, that the state may enact such and similar legislation, although it affects interstate commerce, where Congress has not expressly shown a determination that the commerce should be free from state regulation: *Chicago, R. I. & P. Ry. Co. v. Arkansas* (1911) 219 U. S. 453, 31 Sup. Ct. 275, 55 L. ed. 290; and cases cited there and in *Patterson*, *ubi supra*, chap. 4; see also *Second Employers' Liability Cases—Mondou v. New Y., N. H. & H. R. Co.* (1912) 223 U. S. 1, 54, 55, 32 Sup. Ct. 169, 177, 56 L. ed. 327; compare *Adams Ex. Co. v. Kentucky* (1909) 214 U. S. 218, 222, 29 Sup. Ct. 633, 634, 53 L. ed. 972; *Leisy v. Hardin* (1890) 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128. So also it has said that in spite of the impairment of contract clause a state may make changes in statutes of limitation affecting existing rights of action if the time allowed before the bar takes effect is not palpably unreasonable: *Terry v. Anderson* (1877) 95 U. S. 628, 24 L. ed. 365; see also *Kentucky U. Co. v. Kentucky* (1911) 219 U. S. 140, 156, 157, 31 Sup. Ct. 171, 178, 55 L. ed. 137. While the court holds that the equal protection provision protects against discriminatory legislation, it also holds that a state in legislating may make classifications which are not unreasonable: *Halter v. Nebraska* (1907) 205 U. S. 34, 27 Sup. Ct. 419, 51 L. ed. 696; *Bacon v. Walker* (1907) 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499; *St. Mary's F.-A. P. Co. v. West Virginia* (1906) 203 U. S. 183, 27 Sup. Ct. 132, 51 L. ed. 144; *Campbell v. California* (1906) 200 U. S. 87, 95, 26 Sup. Ct. 182, 185, 50 L. ed. 382; *Plessy v. Ferguson* (1896) 163 U. S. 537, 550, 16 Sup. Ct. 1138, 1143, 41 L. ed. 256; and see *Second Employers' Liability Cases—Mondou v. New Y., N. H. & H. R. Co.* (1912) 223 U. S. 1, 52, 53, 32

that the legislation which it upholds is within the police power of the state.

But the term "police power" is also used in a broader sense to denote all the power of government which the states did not expressly or impliedly ¹³² surrender by the adoption of the Federal Constitution, a power which has no bounds except those imposed by the Federal Constitution.¹³³

Sup. Ct. 169, 176, 56 L. ed. 327.—On the subject of this note see also *Martin v. District of Columbia* (1907) 205 U. S. 135, 139, 27 Sup. Ct. 440, 441, 51 L. ed. 743; *Allen v. Riley* (1906) 203 U. S. 347, 27 Sup. Ct. 95, 51 L. ed. 216; *Woods v. Carl* (1906) 203 U. S. 358, 27 Sup. Ct. 99, 51 L. ed. 219; *Railroad Co. v. Fuller* (1873) 17 Wall. 560, 567, 568, 21 L. ed. 710; *Escanaba & L. M. T. Co. v. Chicago* (1882) 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442; *Lake S. & M. S. Ry. Co. v. Ohio* (1899) 173 U. S. 285, 19 Sup. Ct. 465, 43 L. ed. 702; *Territory of New Mexico v. Denver & R. G. R. Co.* (1906) 203 U. S. 38, 55, 27 Sup. Ct. 1, 5, 51 L. ed. 78; *Asbell v. Kansas* (1908) 209 U. S. 251, 28 Sup. Ct. 485, 52 L. ed. 778; *Morgan's S. Co. v. Louisiana* (1886) 118 U. S. 455, 462, 464, 6 Sup. Ct. 1114, 1117, 1119, 30 L. ed. 237; *Louisville & N. R. Co. v. Kentucky* (1896) 161 U. S. 677, 695, 16 Sup. Ct. 714, 721, 40 L. ed. 849; *New York v. Hesterberg* (1908) 211 U. S. 31, 29 Sup. Ct. 10, 53 L. ed. 75. Compare *North Dakota v. Hanson* (1910) 215 U. S. 515, 525, 30 Sup. Ct. 179, 183, 54 L. ed. 307.

¹³² For example, the court holds that the grant to Congress of power over interstate commerce constitutes a restraint upon the state governments: see secs. 3, 7, *supra*.

¹³³ See *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 111, 31 Sup. Ct. 186, 188, 55 L. ed. 112; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 501, 592, 26 Sup. Ct. 341, 349, 50 L. ed. 596; *New O. G. Co. v. Louisiana L. Co.* (1885) 115 U. S. 650, 661, 662, 6 Sup. Ct. 252, 258, 29 L. ed. 516; *License Cases* (1847) 5 How. 504, 583, 12 L. ed. 256; *House v. Mayes* (1911) 219 U. S. 270, 282, 31 Sup. Ct. 234, 236, 55 L. ed. 213; *German A. I. Co. v. Hale* (1911) 219 U. S. 307, 317, 31 Sup. Ct. 246, 248, 55 L. ed. 229; *Keller v. United States* (1909) 213 U. S. 138, 29 Sup. Ct. 470, 53 L. ed. 737; *Bacon v. Walker* (1907) 204 U. S. 311, 317, 27 Sup. Ct. 289, 291, 51 L. ed. 499; *Halter v. Nebraska* (1907) 205 U. S. 34, 40, 41, 27 Sup. Ct. 419, 421, 51 L. ed. 696; *Cincinnati, I. & W. Ry. Co. v. Connersville* (1910) 218 U. S. 336, 344, 31 Sup. Ct. 93, 95, 54 L. ed. 1060; *Northwestern N. L. I. Co. v. Riggs* (1906) 203 U. S. 243, 253, 27 Sup. Ct. 126, 128, 51 L. ed. 168; *Western T. Assn. v. Greenberg* (1907) 204 U. S. 359, 363, 27 Sup. Ct. 384, 386, 51 L. ed. 520; *Mutual L. Assn. v. Martell* (1911) 222 U. S. 225, 233, 32 Sup. Ct. 74, 75, 56 L. ed. 175; and notes 126, *supra*, and 10 in Chap. 2, *supra*. The term is also used to denote the residuary sovereignty of the state minus

Relevancy of decisions on police power.

111. And, of course, the fact that the court has inquired whether legislation was within the police power of the state, as that term is used in its narrower significance, does not necessarily show that the court should inquire into the necessity or propriety of legislation in all cases. The decisions concerning the police power to which we have referred and in which the term is used in its narrower sense do not justify the court in inquiring into the character of legislation and naming instances in which it will and instances in which it will not permit legislation, unless some express or implied restraints upon governmental action are involved.¹²⁴

Those decisions may well be in point in cases arising under the due process clauses in which questions of procedure are involved. They may show the degree of strictness with which that provision of the Constitution should be enforced. But before we can say that they are in point in cases where the due process provision is invoked in controversies concerning questions of substantive law we must first show that if stringently applied the provision might be given a sweeping effect and held to provide broadly that the legislature may not cause any person to lose his life, liberty or property. If we could say that, the decisions to which we have referred would seem to show by way of analogy that the due process provision was not to be applied stringently where in the opinion of the court

such ordinary powers as by constant use have acquired a separate identity and a definite name, as "taxation," "eminent domain," etc.: *Hastings, Police Power of the State*, 39 *Proc. Am. Phil. Soc.* 405, 414.

¹²⁴ In support of this statement see *Schollenberger v. Pennsylvania* (1898) 171 U. S. 1, 16, 18 *Sup. Ct.* 757, 763, 43 *L. ed.* 49, and note 119, *supra*. But with this statement contrast the cases cited in note 128, *supra*, and the character of the citations in the opinions in those cases, and also note 117, *supra*.

the legislature was properly guarding the welfare of the citizens.

Did those who adopted the clauses intend that as a general rule they should have such an effect? Did they intend to forbid the legislature to change rules of law? Such a change usually affects rights which persons possessed before the law was enacted; and it affects them without any prior judicial proceedings. Compliance with the law may mean a recognition that rights have already been altered; and the enforcement of the law has that meaning. Are the due process clauses violated when changes in the rights which persons theretofore possessed are made before there have been judicial proceedings and the judiciary is called upon simply to recognize and enforce the changes in the law?

Is a change of law a "deprivation"?

112. It is true that as a general rule the government may not lay a heavy hand upon a person until he has had his day in court. But it does not follow that the rules of law which the court is to apply are to be determined then for the first time or that they must be made by that tribunal. On the contrary, we know that those who adopted the Amendments intended that as a general rule governmental commands should be made and enforced by different organs of government—an intention which was shown by their custom of distributing the governmental powers, both of the federal and of the several state governments, among three departments of government. The custom of so distributing governmental powers was so general and continued for so long a time after the adoption of the due process provision that we cannot readily adopt a construction of the due process provision which

is inconsistent with that custom. We must recognize the power of the legislature to make rules of law. And the power to make the law includes the power to change the law.

On the other hand, those who adopted the constitutions clearly intended that the power to enforce the law should not include the power to pass upon legislative questions. We have already seen that there is nothing in the suggestion that governmental commands when made otherwise than by the tribunal which is to enforce them are subject to tests similar to those which in the absence of legislation that tribunal would apply to the acts of individuals.¹³⁵ The legislature may unquestionably change the law;¹³⁶ and when it does so it is the clear and inevitable duty of the courts to enforce the law as enacted by the legislature unless that law violates the Constitution.

Moreover, as we shall see later on,¹³⁷ there are strong reasons for the opinion that the due process provision refers merely to those deprivations which are usually made by way of punishment. And the establishment of a rule of law could hardly be considered the making of such a deprivation.

Summary as to police power.

113. In short, it cannot be said that as a general rule the due process provision forbids the legislature to enact any law the enforcement of which would cause any person to lose his life, liberty or property. As a consequence, we cannot base upon the cases to which the court has re-

¹³⁵ See secs. 33, 49-51, *supra*, and quotation in note 75 in Chapter 3, *supra*.

¹³⁶ See secs. 31, 33, 49-51, *supra*.

¹³⁷ See secs. 127, 128, 131, *infra*.

ferred¹³⁸ the broad statement that by virtue of the due process provision any legislation which affects individuals is unconstitutional if it is unreasonable. And so, while it may be said correctly that the court may inquire into the justification for exercises of the police power, this statement is true only when the term "police power" is given its more restricted meaning, and it is not true when the term is used in its broader sense.

Reasonableness and natural justice.

114. It is quite possible that the assertion that courts may declare invalid legislation which they consider unreasonable, while it claims the support of the due process provision, is based in large measure upon the idea that legislation which conflicts with natural justice is void.¹³⁹ We have, however, already observed that a court is not justified in refusing to enforce legislation upon the ground that it is not in accordance with natural justice.¹⁴⁰

Massachusetts decisions.

115. The court has also referred¹⁴¹ to cases in which

¹³⁸ See note 128, *supra*.

¹³⁹ See Boudin, *Government by Judiciary*, 26 *Pol. Sci. Quar.* 238, 265. Sir Frederick Pollock (*The History of the Law of Nature*, 1 *Col. L. Rev.* 29, 30) quotes St. Germain's statement (*Doctor and Student*, *Dialogue I*, Chap. 5) that where the canonist or civilian would speak of the law of nature, the common lawyer speaks of reason, and says, "Once pointed out, the analogy is obviously just, and a real connection is at least probable, for we are not to suppose that the judges and serjeants never knew any more of what the canonists were doing than is disclosed by the Year Books." On the idea of the supremacy of the law of nature and its history see authorities cited in sec. 100, and note 103, *supra*.—Some American judges who have used the term "natural justice" have in other ways shown acquaintance with writings of civilians.

¹⁴⁰ See note 103, *supra*.

¹⁴¹ See, e. g., *Lawton v. Steele* (1894) 152 U. S. 133, 137, 14 *Sup. Ct.* 499, 501, 38 *L. ed.* 385.

the Supreme Court of Massachusetts has passed upon the propriety of state legislation. But that position was taken by the state court because of a provision in the state constitution which does not appear in the Federal Constitution,¹⁴² so that the cases from Massachusetts are not in point.

Position of court as to arbitrary governmental action.

116. As we have already noted,¹⁴³ the court has said that the due process provision forbids arbitrary governmental action. The word "arbitrary," however, is decidedly indefinite. The court apparently means that a governmental action cannot rest for its validity simply upon the pleasure of the organ of government which has taken that action; but we cannot say with positiveness that the court is making a statement which is more definite than that.

Such a position the court certainly ought to take in some cases. It should say that, in view of the constitutional objections to delegations of legislative power which usually exist, an administrative body as a general rule cannot exercise, even under color of a legislative grant of power, a wide range of discretion, but that it may act only in accordance with pre-established rules;¹⁴⁴ and the court should say that in view of the due process provision of the Fourteenth Amendment such a requirement when

¹⁴² "The Massachusetts Supreme Court, owing to the formula by which power is vested in the Massachusetts constitution in the legislature to pass 'all manner of wholesome and reasonable' laws, had never ceased to describe the police power, even when according to it the broadest possible field of operation, as a power of 'reasonable' legislation:" Corwin, *Due Process of Law Before the Civil War*, 24 Harv. L. Rev. 460, 478. See also Corwin, *The Establishment of Judicial Review*, 9 Mich. L. Rev. 283, 315.

¹⁴³ Sec. 105, *supra*.

¹⁴⁴ See sec. 39, *supra*.

based upon the state constitution may be enforced in the federal courts.

But the Supreme Court does not take that position.¹⁴⁵ It declares, rather, that the due process requirement does not authorize the federal courts to enforce compliance with any of the provisions of the state constitutions, as such. And instead of limiting its statement the court seems to take, instead, the position that no organ of government may exercise arbitrary power. The court apparently means to say, at times at least, that the due process provision forbids governmental acts which are oppressive or unjust or not based upon a sufficient reason.

Discussion of position.

117. We have already seen, however, that the court cannot properly declare that the acts of other organs of government are unconstitutional simply because they bring about results which are in the opinion of the court clearly unjustifiable from an economic or a social standpoint.¹⁴⁶

And the court certainly cannot take the position that the judiciary possesses the right to review all the actions of other organs of government. As Mr. Sedgwick has well said, "If it is meant to assert that there should be no absolute power in each department of government, then it is so far from being true, that, on the contrary, without such power no government could regularly exist an hour; all would be conflict and confusion. It cannot be denied that, practically, despotic power must somewhere exist in every system that assumes to order and regularity. Appeals must terminate, controversies must cease, discus-

¹⁴⁵ See sec. 63, *supra*.

¹⁴⁶ See notes 83, *supra*, and 53, *supra*.

sions must end, and the business of life proceed. To effect this, it is indispensable that there must be somewhere lodged, in regard to the operations of every department of government, a supreme, inexorable power whose decision is conclusive; and whether the system be that of a monarchy, an oligarchy, a democracy, or that mixed form under which we live, such power will always be found. In the very case before us, what is the result of the reasoning but to claim for the judiciary the very absolutism which is denied to the legislature? If the statute is conclusive, then the legislature is absolute;—granted. But if the judgment of the court is final,—and to be efficacious it must be so,—then you encounter the same difficulty at only one remove.”¹⁴⁷ “The law,” as was said by the Supreme Court of Michigan,¹⁴⁸ “must leave the final decision upon every claim and every controversy somewhere, and when that decision has been made, it must be accepted as correct.”¹⁴⁹

¹⁴⁷ Sedgwick, *Interpretation and Construction of Statutory and Constitutional Law*, 2d ed., 154.

¹⁴⁸ *Sutherland v. Governor* (1874) 29 Mich. 320, 330, 331.

¹⁴⁹ See also section 51, *supra*, and note 75 in Chapter 3, *supra*.—In *Standard Oil Co. v. Missouri* (1912) 224 U. S. 270, 286, 32 Sup. Ct. 406, 411, 56 L. ed. 760, the Supreme Court declared, “The power to render a final judgment must be lodged somewhere, and in every case a point is reached where litigation must cease. What that point is can be determined by the legislative power of the state, for right of appeal is not essential to due process of law.” In *Chicago, B. & Q. Ry. Co. v. Babcock* (1907) 204 U. S. 585, 598, 27 Sup. Ct. 326, 329, 51 L. ed. 636, the court said, “The action does not appear to have been arbitrary except in the sense in which many honest and sensible judgments are so. They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—impressions which may lie beneath consciousness without losing their worth. [With this compare *Interstate Com. Comn. v. Louisville & N. R. Co.* (1913) 227 U. S. 88, 93, 33 Sup. Ct. 185, 187, 57 L. ed. 431; *United States v. Baltimore & O. S. W. R. Co.* (1912) 226 U. S. 14, 20, 33 Sup. Ct. 5, 6, 57 L. ed. 104.] The board was created for the purpose of using its judgment and its knowledge. . . . Within its jurisdiction, except, as we have said, in

Reasonableness of rate regulations.

118. In conclusion we must note those cases in which the court has declared that the due process provision authorizes the judiciary to pass upon the reasonableness of rate regulations.¹⁵⁰ This position has been based upon three grounds.

It has been said broadly that only reasonable regulations may be imposed upon carriers.¹⁵¹ This statement, which applies to all organs of government, does not rest

the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end." In *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 515, 516, 22 Sup. Ct. 95, 100, 46 L. ed. 298, the court said, "Finality is a characteristic of the judgments of all tribunals, unless the laws provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of lands taken for public use, or to assess damages to them whose findings are deemed final. Yet the evidence on which they act is not preserved, nor do the courts go into any inquiry into the various sources and grounds of judgment upon which the appraisers have proceeded. If there are charges of fraud or corruption, the courts may consider them; but it has never been held that the finality of their findings made the action of the appraisers unconstitutional or void."

¹⁵⁰ *Smyth v. Ames* (1898) 171 U. S. 361, 18 Sup. Ct. 488, 43 L. ed. 197, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858; *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970; *Ex parte Young* (1908) 209 U. S. 123, 147, 28 Sup. Ct. 441, 448, 52 L. ed. 714, 13 L. R. A. N. S. 932, 942. See also *Railroad Comm. of La. v. Cumberland T. & T. Co.* (1909) 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577; *Alabama & V. Ry. Co. v. Mississippi R. Comm.* (1906) 203 U. S. 496, 501, 27 Sup. Ct. 163, 165, 51 L. ed. 289; *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 269, 22 Sup. Ct. 900, 905, 46 L. ed. 1151; cases in notes 165, 166, *infra*. Compare *Munn v. Illinois* (1876) 94 U. S. 113, 133, 24 L. ed. 77; *Peik v. Chicago & N. W. Ry. Co.* (1876) 94 U. S. 164, 178, 24 L. ed. 97; *Budd v. New York* (1892) 143 U. S. 517, 546-548, 12 Sup. Ct. 468, 476, 477, 36 L. ed. 247; *Smalley, Railroad Rate Control* (Publications of the American Economic Assn.) 25, 39, 40, 48, 49, 50.

¹⁵¹ See, e. g., *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858.

upon considerations which are peculiar to carriers, and therefore does not call for separate examination.

It has been said that because at common law the judiciary had jurisdiction to determine whether the rates named by the carrier were reasonable it follows that the courts have jurisdiction to determine whether rates named by an organ of government are reasonable.¹⁵² We have already examined this position¹⁵³ and we have seen that if the courts have power to inquire into the reasonableness of rate regulations established by an organ of government that power must rest upon some other ground.

And it has been said that where the legislature provides that rates shall be reasonable the determination of what are reasonable rates is a part of the enforcement of the law and is, therefore, a matter which must be decided by the courts.¹⁵⁴ Of course, if the legislature simply provides that rates shall be reasonable, and the courts consider that a definite rule of law is thereby established, the courts may enforce that rule and in order to do so may, in cases properly before them, determine what are reasonable rates.¹⁵⁵ But, on the other hand, the court of last resort has declared repeatedly that the legislature itself may name specific rates for future transportation and that it may authorize a commission to name such rates in accordance with principles laid down by the legislature and that in so doing it is not entrenching upon the power of the judiciary.¹⁵⁶ Where, therefore, a regulation does

¹⁵² See note 33 in Chapter 2, *supra*, and see sec. 121, *infra*.

¹⁵³ See secs. 33, 34, 49-51, 60, *supra*.

¹⁵⁴ See *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970; *Ex parte Young* (1908) 209 U. S. 123, 147, 28 Sup. Ct. 441, 448, 52 L. ed. 714, 13 L. R. A. N. S. 932, 942; *Missouri P. Ry. Co. v. Tucker* (1913) 230 U. S. 340, 33 Sup. Ct. 961, 57 L. ed. 1507.

¹⁵⁵ See secs. 49, 50, *supra*.

¹⁵⁶ See secs. 34, 35, 38, 51, 60, *supra*.

not violate the substantive restraints of the constitutions the legislature may unquestionably restrict the power of the courts simply to the consideration of the question whether or not that regulation has been obeyed.

It may be added that in recent cases relating to rate regulation the court usually instead of saying simply that the due process provision prohibits the imposition of unreasonable rates says rather that it prohibits the imposition of rates which are "plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as under the circumstances is just both to the owner and the public."¹⁵⁷ This is a somewhat different position¹⁵⁸ and it will constitute the next topic for our consideration.

¹⁵⁷ *Willcox v. Consolidated G. Co.* (1909) 212 U. S. 19, 41, 29 Sup. Ct. 192, 195, 53 L. ed. 382. The language used is taken almost verbatim from *San Diego L. & T. Co. v. National City* (1899) 174 U. S. 739, 754, 19 Sup. Ct. 804, 810, 43 L. ed. 1154, where the court adds, "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." See also *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 16, 17, 18, 29 Sup. Ct. 148, 153, 154, 53 L. ed. 371; and other cases in note 161, *infra*; *Noyes, American Railroad Rates*, 212, note. Compare end of note 160, *infra*.

¹⁵⁸ It is conceivable that rates which would yield what abstractly considered would be just compensation to the carrier might be in other respects so unreasonable or so discriminatory as to be unconstitutional. Even where the carrier did not raise the question—and the carrier would not always have the right so to do—(with *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858, compare *Interstate Com. Comn. v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946) the objection might possibly be raised by shippers or passengers in one part of the state or one part of the country or by one or more classes of shippers or classes of passengers. (See, however, *Board of R. Comrs. v. Symms Grocer Co.* (1894) 53 Kan. 207, 35 Pac. 217.)

We shall postpone to a later chapter¹⁵⁹ the consideration of the principles which are invoked in applying these tests and which determine whether the limits imposed are such that their enforcement would be declared unconstitutional.

JUST COMPENSATION.

The position of the court.

119. The United States Supreme Court has frequently said that the due process clause of the Fourteenth Amendment forbids the taking of private property for public use without just compensation;¹⁶⁰ and this statement has been

¹⁵⁹ Chapter 6, *infra*.

¹⁶⁰ *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 593, 26 Sup. Ct. 341, 350, 50 L. ed. 596; *Norwood v. Baker* (1898) 172 U. S. 269, 19 Sup. Ct. 187, 43 L. ed. 443. See also *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979; *Appleby v. Buffalo* (1911) 221 U. S. 524, 530, 532, 31 Sup. Ct. 699, 701, 702, 55 L. ed. 838; *Sauer v. New York* (1907) 206 U. S. 536, 547, 548, 27 Sup. Ct. 686, 689, 690, 51 L. ed. 1176; *West C. S. R. Co. v. People* (1906) 201 U. S. 506, 26 Sup. Ct. 518, 50 L. ed. 845; *California R. Co. v. Sanitary R. Works* (1905) 199 U. S. 306, 26 Sup. Ct. 100, 50 L. ed. 204; *Union R. T. Co. v. Kentucky* (1905) 199 U. S. 194, 26 Sup. Ct. 36, 50 L. ed. 150; *Ohio Oil Co. v. Indiana* (1900) 177 U. S. 190, 20 Sup. Ct. 576, 44 L. ed. 429; *Henderson B. Co. v. Henderson City* (1899) 173 U. S. 592, 614, 19 Sup. Ct. 553, 561, 562, 43 L. ed. 823; *Backus v. Fort S. U. D. Co.* (1898) 169 U. S. 557, 18 Sup. Ct. 445, 42 L. ed. 853; *Holden v. Hardy* (1898) 169 U. S. 366, 390, 18 Sup. Ct. 383, 387, 42 L. ed. 780; *Long I. W. S. Co. v. Brooklyn* (1897) 166 U. S. 685, 17 Sup. Ct. 718, 41 L. ed. 1165; *McGovern v. City of New York* (1913) 229 U. S. 363, 371, 33 Sup. Ct. 876, 877, 57 L. ed. 1228; *Ettor v. Tacoma* (1913) 228 U. S. 148, 33 Sup. Ct. 428, 57 L. ed. 773; *Manigault v. Springs* (1905) 199 U. S. 473, 26 Sup. Ct. 127, 50 L. ed. 274; *Gardner v. Michigan* (1905) 199 U. S. 325, 26 Sup. Ct. 106, 50 L. ed. 212; *Muhlker v. New Y. & H. R. Co.* (1905) 197 U. S. 544, 25 Sup. Ct. 522, 49 L. ed. 872; *New O. G. L. Co. v. Drainage Comm.* (1905) 197 U. S. 453, 25 Sup. Ct. 471, 49 L. ed. 831; *Williams v. Parker* (1903) 188 U. S. 491, 23 Sup. Ct. 440, 47 L. ed. 559; *Missouri P. Ry. Co. v. Nebraska* (1910) 217 U. S. 196, 30 Sup. Ct. 461, 54 L. ed. 727; and cases in notes 161, 190, 191, *infra*.—The court, however, in declaring that the due process provision requires the payment of compensation when property is taken for public use has not always followed strictly the phraseology

made a basis for declaring invalid state regulations which were said by the court to limit rates to an improper extent.¹⁶¹

Dicta in earliest cases.

120. Its declaration that a state may not so take private property was at first made almost exclusively¹⁶² in

of the provision for just compensation in the Fifth Amendment (see, e. g., *Backus v. Fort S. U. D. Co.* (1898) 169 U. S. 557, 565, 576, 578, 18 Sup. Ct. 445, 448, 452, 453, 42 L. ed. 853), so that it is not altogether clear that that tribunal would examine the adequacy of compensation for property taken as closely if the question arose under the due process provision as it would if the question arose under the provision for just compensation in the Fifth Amendment. But compare final paragraph in section 118, *supra*.

¹⁶¹ *Smyth v. Ames* (1898) 171 U. S. 361, 18 Sup. Ct. 488, 43 L. ed. 197, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858. See also *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 434, 33 Sup. Ct. 729, 754, 57 L. ed. 1511; *Lincoln G. & E. L. Co. v. Lincoln* (1912) 223 U. S. 349, 32 Sup. Ct. 271, 56 L. ed. 466; *Willcox v. Consolidated G. Co.* (1909) 212 U. S. 19, 41, 42, 44, 45, 29 Sup. Ct. 192, 195, 196, 197, 53 L. ed. 382; *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 16, 17, 18, 29 Sup. Ct. 148, 153, 154, 53 L. ed. 371; *San Diego L. & T. Co. v. National City* (1899) 174 U. S. 739, 754, 19 Sup. Ct. 804, 810, 43 L. ed. 1154; *Peoria G. & E. Co. v. Peoria* (1906) 200 U. S. 48, 26 Sup. Ct. 214, 50 L. ed. 365; *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 22 Sup. Ct. 95, 46 L. ed. 298; *Railroad Comn. of La. v. Cumberland T. & T. Co.* (1909) 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577; and *Interstate Com. Comn. v. Union P. R. Co.* (1912) 222 U. S. 541, 547, 32 Sup. Ct. 108, 111, 56 L. ed. 308, the last of which referred to the Fifth Amendment. Compare *Norfolk & S. T. Co. v. Virginia* (1912) 225 U. S. 264, 32 Sup. Ct. 828, 57 L. ed. 1082; *Back R. N. T. Co. v. Homberg* (1903) 96 Md. 430, 54 Atl. 82; *Martin*, Recent Federal Court Decisions Affecting State Laws Regulating Freight and Passenger Rates, 21 Yale L. J. 117, 120, 121, 125.

¹⁶² See, however, dicta by Bradley, J., in concurring opinion in *Davidson v. New Orleans* (1877) 96 U. S. 97, 107, 24 L. ed. 616. But compare dissenting opinion by same justice in *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 465, 10 Sup. Ct. 462, 705, 33 L. ed. 970. In *Baker v. Village of Norwood* (1896) 74 Fed. 997, 1000, and *Scott v. City of Toledo* (1888) 36 Fed. 385, 394, 1 L. R. A. 688, it is said that a dicta from a concurring opinion in *Davidson v. New Orleans* is quoted with approval in *Kentucky R. Tax Cases* (1885) 115 U. S. 321, 331, 6 Sup. Ct. 57, 60, 29 L. ed.

dicta in which no reference was made to the due process clause as a basis for the statement.¹⁶³ It was apparently made because of the existence of a just compensation provision in the Fifth Amendment, which, of course, is not a restraint upon state action, or because of the existence of just compensation provisions in state constitutions, provisions with which the Supreme Court cannot properly concern itself in cases coming from state courts.¹⁶⁴

Chicago, M. & St. P. Ry. Co. v. Minnesota.

121. Then followed a case under the due process clause in which it was held that a non-judicial body cannot limit the charges of railroads to an unreasonable extent.¹⁶⁵

414; but in the latter case the Supreme Court does not quote any of the language cited in the Norwood case, it does not quote all of the language cited in the Toledo case, and its approval is of a portion of the language actually quoted which relates strictly to procedure.

¹⁶³ Justice Field, who subsequently declared in a dissenting opinion in *O'Neil v. Vermont* (1892) 144 U. S. 323, 363, 12 Sup. Ct. 693, 708, 36 L. ed. 450, that the states may not abridge rights of person which the first eight Amendments protect against infringement by the federal government, declared in a dissenting opinion in *Spring V. W. v. Schottler* (1884) 110 U. S. 347, 377, 4 Sup. Ct. 48, 63, 28 L. ed. 173, a case coming from a state court, that a state may not take private property without just compensation. See also *Munn v. Illinois* (1876) 94 U. S. 113, 145, 24 L. ed. 77. In *Stone v. Farmers' L. & T. Co.* (1886) 116 U. S. 307, 331, 6 Sup. Ct. 334, 345, 29 L. ed. 636, Waite, C. J., declared in a dictum that a state may not so take private property. This dictum was cited in dicta in *Dow v. Beidelman* (1888) 125 U. S. 680, 689, 8 Sup. Ct. 1028, 1030, 31 L. ed. 841; *Georgia R. & B. Co. v. Smith* (1888) 128 U. S. 174, 179, 9 Sup. Ct. 47, 48, 32 L. ed. 377; *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 456, 10 Sup. Ct. 462, 466, 33 L. ed. 970 (see also dissenting opinion, 134 U. S. 465, 10 Sup. Ct. 705, 33 L. ed. 984); *Budd v. New York* (1892) 143 U. S. 517, 547, 12 Sup. Ct. 468, 477, 33 L. ed. 247. Compare Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 Mich. L. Rev. 643, 658; Smalley, *Railroad Rate Control* (Publications of the American Economic Assn.) 25 et seq.

¹⁶⁴ See notes 45, 47 in Chapter 3, supra.

¹⁶⁵ *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970. The court rested its decision almost en-

The decision related to the **method** of regulating railroad rates. This case has been cited in some later opinions in company with cases to which we have already referred which contained dicta on just compensation. In some instances the phrases "reasonable rates" and "just compensation" are intermingled in the same opinions.¹⁶⁶

tirely on the matter of procedure, although it did make a brief reference to the equal protection provision. See also *Ex parte Young* (1908) 209 U. S. 123, 147, 148, 166, 28 Sup. Ct. 441, 448, 449, 456, 52 L. ed. 714, 13 L. R. A. N. S. 932, 942, 950; *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 397, 14 Sup. Ct. 1047, 1054, 38 L. ed. 1014; *Missouri P. Ry. Co. v. Tucker* (1913) 230 U. S. 340, 33 Sup. Ct. 961, 57 L. ed. 1507, and comments on positions taken in these cases expressed in section 60, *supra*; authorities cited in note 16 of Chapter 2, *supra*; note 150 of Chapter 4, *supra*; and Smalley, *Railroad Rate Control* (Publications of the American Economic Assn.) 25, 32 et seq., 119, 120; Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 Mich. L. Rev. 643, 660, 661; sections 111, 112, *supra*. On the method followed by the commission in *C., M. & St. P. Ry. Co. v. Minnesota* see *Chicago, B. & Q. Ry. Co. v. Babcock* (1907) 204 U. S. 585, 598, 27 Sup. Ct. 326, 329, 51 L. ed. 636, quoted in note 149, *supra*; *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 278, 29 Sup. Ct. 50, 54, 53 L. ed. 176, quoted in note 51 of Chapter 3, *supra*; and also *Chesapeake & P. T. Co. v. Manning* (1902) 186 U. S. 238, 245, 22 Sup. Ct. 881, 884, 46 L. ed. 1144, quoted in note 50 of Chapter 3, *supra*. On the suggestion that the commission was exceeding the power granted to it by the statute, it may be thought that the cases in note 147 of Chapter 2, *supra*, sustain the position taken by the court, but this seems to be incorrect in view of the cases cited in the latter part of note 47 of Chapter 3, *supra*.

¹⁶⁶ In *Chicago & G. T. Ry. Co. v. Wellman* (1892) 143 U. S. 339, 344, 12 Sup. Ct. 400, 402, 30 L. ed. 176, the court says, "The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates," citing *Stone v. Farmers' L. & T. Co.* (see note 163, *supra*) and *Chicago, M. & St. P. Ry. Co. v. Minnesota* (see note 165, *supra*) and thus blending two ideas. In *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 398, 399, 14 Sup. Ct. 1047, 1054, 1055, 38 L. ed. 1014, these two cases are cited as authorities for the proposition that the judiciary may restrain any regulation of rates "which operates to deny to the owners of property invested in the business of transportation that *equal protection* which is the constitutional right of all owners of other property." See also *St. Louis & S. F. Ry. Co. v. Gill* (1895) 156 U. S. 649, 658, 15 Sup. Ct. 484, 488, 39 L. ed. 567; *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 592, 597, 17 Sup. Ct. 198, 204, 205, 41 L. ed. 560; *Smyth v. Ames* (1898) 169 U. S. 466, 523, 18 Sup. Ct. 418, 425, 42 L. ed. 819; *Louisville & N. R. Co. v.*

Kaukauna and Yesler cases.

122. Then followed *Kaukauna W. P. Co. v. Green B. & M. C. Co.*¹⁶⁷ and *Yesler v. Washington H. L. Comrs.*,¹⁶⁸ in which the court declared that the taking of property without compensation constitutes a deprivation without due process of law. In the opinion in the former case there was no discussion of the question and no authorities were cited in support of the position taken.¹⁶⁹ In *Yesler v. Washington H. L. Comrs.*, while the court did not decide that the action of the state took any of the relator's property or so injuriously affected it as to be unconstitutional, the court said that it assumed its "jurisdiction to revise the judgment of a state tribunal upholding a law authorizing the taking of private property without com-

Kentucky (1902) 183 U. S. 503, 511, 22 Sup. Ct. 95, 99, 46 L. ed. 298. In *Smyth v. Ames* (1898) 171 U. S. 361, 18 Sup. Ct. 488, 43 L. ed. 197; *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858; *San Diego L. & T. Co. v. National City* (1899) 174 U. S. 739, 754, 19 Sup. Ct. 804, 810, 43 L. ed. 1154; *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417, the phrases "reasonable rates" and "just compensation" are intermingled in the same opinions.

¹⁶⁷ (1891) 142 U. S. 254, 12 Sup. Ct. 173, 35 L. ed. 1004.

¹⁶⁸ (1892) 146 U. S. 646, 13 Sup. Ct. 190, 36 L. ed. 1119.

¹⁶⁹ In that case the court said, "It is evident that the court could not have reached a conclusion adverse to the defendant company without holding, either that none of its property had been taken, or that it was not entitled to compensation therefor, which is equivalent to saying that it had not been deprived of its property without due process of law." "We think these facts and allegations are sufficient to raise the constitutional question whether the property of the Water Power Company had been taken without compensation, and that the motion to dismiss should, therefore, be denied:" 142 U. S. at 269, 271, 12 Sup. Ct. at 176, 177, 35 L. ed. at 1009. The decree of the state court was affirmed. The court cited no authority for the position stated in the language quoted above. Counsel had cited (142 U. S. at 268) the concurring opinion of one justice in an earlier case, a part of whose language, had it been that of the court, would have directly supported the position taken in the *Kaukauna* case; and he had cited an opinion of the court which quoted with approval another part of that concurring opinion which was not so clearly in point.

pensation to be unquestionable,"¹⁷⁰ citing in support of that assumption simply the *Kaukauna* case, in which, as already pointed out, there was no discussion of the question and no citation of authorities in support of the position.

The court said in the *Yesler* case that the provision forbidding the federal government to take private property for public use without just compensation, "expressed in the Fifth Amendment, is to be read with the Fourteenth Amendment, prohibiting the states from depriving any person of property without due process of law, and from denying to any person within their jurisdiction the equal protection of the laws. The Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights."¹⁷¹

The statement that a provision of the Fifth Amendment which is not repeated in the Fourteenth Amendment should be read with the latter Amendment obviously adds nothing to the value of the opinion. If the court might say that, because the Fifth Amendment provides for due process and just compensation, the Fourteenth Amendment which speaks merely of due process of law provides also for just compensation, the court might say with equal propriety that because Section 10 of Article I of the Constitution declares that no state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, therefore the provision of Section 9 of that Article that Congress shall not pass any bill of attainder or ex post facto law includes a prohibition upon Congress to pass any law which impairs the obligation of

¹⁷⁰ 146 U. S. at 655, 13 Sup. Ct. at 194, 36 L. ed. at 1122.

¹⁷¹ 146 U. S. at 655, 13 Sup. Ct. at 194, 36 L. ed. 1122.

contracts. To that extent at least the position of the court is clearly unsound.^{171a}

We have already considered the question whether the due process provision prohibits governmental action which is arbitrary.¹⁷²

Chicago, B. & Q. R. Co. v. Chicago.

123. Several years later, without referring to the two cases which we have just noted, the court, in *Chicago, B. & Q. R. Co. v. Chicago*,¹⁷³ declared that the payment of just compensation when private property is taken for public use is essential to due process of law. The court, however, affirmed the judgment of the state court. It discussed the question at some length and gave a number of citations, but its reasons, with but one exception,¹⁷⁴ may be dismissed without further consideration.

In support of its position the court referred to decisions, dicta and statements of text-writers that the legislative customs of England,¹⁷⁵ natural justice,¹⁷⁶ common law,¹⁷⁷ principles of universal law,¹⁷⁸ and principles of

^{171a} See note 201, *infra*.

¹⁷² See secs. 89, 91, 105, 116, 117, *supra*.

¹⁷³ (1897) 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979.

¹⁷⁴ See sec. 124, *infra*.

¹⁷⁵ Blackstone, Commentaries, I, *138, *139. (See also note 100, *supra*. Compare discussion in text on that page.)

¹⁷⁶ Story, Const., sec. 1790, which deals with the provision for just compensation in the Fifth Amendment; *Bradshaw v. Rogers* (1822) 20 Johns. 103, 106; *Martin et al., Ex parte* (1853) 13 Ark. 198, 206 et seq.; *Johnston v. Rankin* (1874) 70 N. C. 550, 555; *Gardner v. Newburgh* (1816) 2 Johns. Ch. 162. See also *Monongahela N. Co. v. United States* (1893) 148 U. S. 312, 325, 13 Sup. Ct. 622, 626, 37 L. ed. 463. (And see discussion in secs. 92-104, 113, *supra*.)

¹⁷⁷ Story, Const., sec. 1790; *Parham v. The Justices* (1851) 9 Ga. 341, 348; *Sinnickson v. Johnson* (1839) 17 N. J. L. 129, 145. See also *Scott v. City of Toledo* (1883) 36 Fed. 385, 394. (Compare note 16 in Chapter 2, *supra*. The New Jersey case was cited in *Pumpelly v. Green B. & M. C. Co.*

general constitutional law,¹⁷⁹ require the payment of just compensation when property is taken for public use. We have already examined these propositions and we have seen that they do not justify the decision.

The court also referred to decisions on provisions for just compensation in state constitutions,¹⁸⁰ to a decision on the provision for just compensation in the Fifth Amendment,¹⁸¹ and to a decision that the impairment of contract clause prevents deprivation without just compensation.¹⁸² Those decisions obviously have no bearing upon the question under consideration.

(1871) 13 Wall. 166, 178, 20 L. ed. 557, mainly for the purpose of showing what constitutes a taking.)

¹⁷⁸ Story, Const., sec. 1790; *Petition of Mt. Washington Road Co.* (1857) 35 N. H. 134, 142. (See also dissenting opinion in *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 598, 26 Sup. Ct. 341, 352, 50 L. ed. 596. Such principles cannot have any greater weight on constitutional questions than have "principles of general constitutional law," discussed in note 179, *infra*.)

¹⁷⁹ Cooley, *Constitutional Limitations*, *559, 7th ed., 812. See also *ibid.* *356, *357, 7th ed., 505, 506, 507; and *Fletcher v. Peck* (1810) 6 Cranch, 87, 135, 136, 3 L. ed. 162; *Loan Assn. v. Topeka* (1874) 20 Wall. 655, 663, 22 L. ed. 455; *Cole v. La Grange* (1885) 113 U. S. 1, 5 Sup. Ct. 416, 28 L. ed. 396; *Searl v. School Dist.* (1890) 133 U. S. 553, 560, 562, 10 Sup. Ct. 374, 376, 377, 33 L. ed. 740, cases which arose in federal courts. (When the validity of a law under the state constitution is involved, such principles, it is said, may be considered in a case arising in a federal court unless a state court has already passed upon the question—but only under such circumstances: see *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 155, 17 Sup. Ct. 56, 62, 41 L. ed. 369; *Davidson v. New Orleans* (1877) 96 U. S. 97, 105, 24 L. ed. 616; *Satterlee v. Matthewson* (1829) 2 Pet. 380, 413, 414, 7 L. ed. 458; and note 47 in Chapter 3, *supra*.)

¹⁸⁰ *Pumpelly v. Green B. & M. C. Co.* (1871) 13 Wall. 166, 20 L. ed. 557; *Searl v. School Dist.* (1890) 133 U. S. 553, 560, 562, 10 Sup. Ct. 374, 376, 377, 33 L. ed. 740; *Sweet v. Rechel* (1895) 159 U. S. 380, 392, 398, 399, 16 Sup. Ct. 43, 45, 48, 40 L. ed. 188.

¹⁸¹ *Monongahela N. Co. v. United States* (1893) 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463. (Compare *Barron v. Baltimore* (1833) 7 Pet. 243, 8 L. ed. 672.)

¹⁸² *People v. Platt* (1819) 17 Johns. 195, 215.

The court cited a decision of a state court that the taking of property without just compensation is forbidden by the state constitution and by the Fourteenth Amendment to the Federal Constitution.¹⁸³ The provision of the state constitution which was referred to¹⁸⁴ clearly covers the question, so that reference to the Federal Constitution was unnecessary, and, moreover, the state court did not say that it is the due process provision of the Fourteenth Amendment which requires compensation.

The court referred to a decision, a dictum and statements by text-writers that not all legislative action, nor all procedure prescribed by the legislature, would satisfy the constitutional requirement.¹⁸⁵ We have already examined these indefinite propositions¹⁸⁶ and we have seen that their validity is questionable. But even if the propositions were clearly established it would not necessarily

¹⁸³ *Proprietors of Mt. Hope Cemetery v. Boston* (1893) 158 Mass. 509, 519, 33 N. E. 695, 698.

¹⁸⁴ "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection, to give his personal service, or an equivalent, when necessary; but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor:" Declaration of Rights, Article X.

¹⁸⁵ *Scott v. City of Toledo* (1888) 36 Fed. 385, 393, 1 L. R. A. 688; *Davidson v. New Orleans* (1877) 96 U. S. 97, 102, 24 L. ed. 616; *Cooley, Constitutional Limitations*, *356, *357, 7th ed., 505-507; *Story, Const.*, II, sec. 1956. (And see *Lochner v. New York* (1905) 198 U. S. 45, 56, 25 Sup. Ct. 539, 542, 49 L. ed. 937; *Murray's Lessee v. Hoboken L. & I. Co.* (1855) 18 How. 272, 276, 15 L. ed. 372; *Cooley, Const. Lim.*, *354, 7th ed., 503; and cases in note 58 of Chapter 3, *supra*.)

¹⁸⁶ See *Topics Is Provision Necessarily a Substantive Restraint and The Law of the Land*, *supra*.

follow that the due process clauses ordained the particular substantive restraint which is now under consideration.

The court cites two decisions by federal circuit courts that just compensation for property taken for public use is required by the due process clause of the Fourteenth Amendment.¹⁸⁷ Those decisions are based to a considerable extent upon misstatements as to the position of the Supreme Court in one case,¹⁸⁸ and upon a dictum in another case which is fully counter-balanced by another dictum in that same earlier case which is more directly in point.¹⁸⁹

The taking of property for private use.

124. There remains for our consideration but one ground for the decision in the Chicago case. The court also based that decision upon earlier statements that the taking of property from one individual without his consent and giving it to another would be a deprivation

¹⁸⁷ *Scott v. City of Toledo* (1888) 36 Fed. 385, 1 L. R. A. 688, followed in *Baker v. Village of Norwood* (1896) 74 Fed. 997.

¹⁸⁸ See comment on the above cases in note 162, *supra*.

¹⁸⁹ In the Toledo case the court says, "It involves no forced or unreasonable construction to hold that this Fourteenth Amendment, as applied to the appropriation of private property for public uses, was clearly intended to place the same limitation upon the power of the states which the Fifth Amendment had placed upon the authority of the federal government:" 36 Fed. 395, 1 L. R. A. 695. Compare page 234, *supra*; note 53, *supra*, and cases in note 201, *infra*.) "There is no difference in principle between the case put by Mr. Justice Miller, as an illustration, in *Davidson v. New Orleans* (1877) 96 U. S. 97, 102, 24 L. ed. 616, viz., the taking of property from A. and vesting it in B., and the taking of property from an individual and vesting it in the public:" 36 Fed. 396, 1 L. R. A. 395. (Compare *Davidson v. New Orleans* (1877) 96 U. S. 97, 105, 24 L. ed. 616, 620; *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 158, 17 Sup. Ct. 56, 63, 41 L. ed. 369; 21 Harv. L. Rev. at 392, 393.) *Scott v. City of Toledo* is measurably supported by *Henderson v. Central P. Ry. Co.* (1884) 21 Fed. 358, 365. See also Story, Const., sec. 1956.

without due process of law.¹⁹⁰ There are later decisions and statements to the same effect.¹⁹¹ The rule seems to be desirable, although the court has usually found it impossible to be strict in passing upon the question whether the use for which the property was taken was public or private.¹⁹² But the court has not in a single case in which it has taken that position shown that such a rule can be properly based upon the due process provision.¹⁹³

¹⁹⁰ *Missouri P. Ry. Co. v. Nebraska* (1896) 164 U. S. 403, 17 Sup. Ct. 130, 41 L. ed. 489. (In *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 158, 17 Sup. Ct. 56, 63, 41 L. ed. 369, the court apparently concedes that the just compensation provision does not apply to the states. In *Cole v. La Grange* (1885) 113 U. S. 1, 5 Sup. Ct. 416, 28 L. ed. 396, cited at 164 U. S. 161, 17 Sup. Ct. 64, 41 L. ed. 390; *Parkersburg v. Brown* (1883) 106 U. S. 487, 501, 1 Sup. Ct. 442, 453, 27 L. ed. 238; *Loan Assn. v. Topeka* (1874) 20 Wall. 655, 22 L. ed. 455, three cases in which it was declared that the state legislatures could not authorize the taking of private property for private uses, the court was interpreting state constitutions. The cases arose in federal courts.) In *Chicago, B. & Q. R. Co. v. Chicago* the court also cited a dictum in *Davidson v. New Orleans* (1877) 96 U. S. 97, 102, 24 L. ed. 616, 619, and might have referred to 96 U. S. 107, 24 L. ed. 621, (see note 162, *supra*) but omitted reference to 96 U. S. 105, 24 L. ed. 620.

¹⁹¹ *Cleveland E. Ry. Co. v. Cleveland & F. C. Ry. Co.* (1907) 204 U. S. 116, 27 Sup. Ct. 202, 51 L. ed. 399 (with which compare *Offield v. New Y., N. H. & H. R. Co.* (1906) 203 U. S. 372, 27 Sup. Ct. 72, 51 L. ed. 231); *Madisonville T. Co. v. St. Bernard M. Co.* (1905) 196 U. S. 239, 251, 25 Sup. Ct. 251, 256, 49 L. ed. 462. See also *Missouri P. Ry. Co. v. Nebraska* (1910) 217 U. S. 196, 30 Sup. Ct. 461, 54 L. ed. 727; *Louisville & N. R. Co. v. Central S. Y. Co.* (1909) 212 U. S. 132, 29 Sup. Ct. 246, 53 L. ed. 441; *Holden v. Hardy* (1898) 169 U. S. 366, 390, 18 Sup. Ct. 383, 387, 42 L. ed. 780; *King v. Hatfield* (1900) 130 Fed. 564; and cases in note 192, *infra*.

¹⁹² *Hairston v. Danville & W. Ry. Co.* (1908) 208 U. S. 598, 607, 28 Sup. Ct. 331, 335, 52 L. ed. 637; *Offield v. New Y., N. H. & H. R. Co.* (1906) 203 U. S. 372, 27 Sup. Ct. 72, 51 L. ed. 231; *Otis Co. v. Ludlow M. Co.* (1906) 201 U. S. 140, 26 Sup. Ct. 353, 50 L. ed. 696; *Strickley v. Highland B. G. M. Co.* (1906) 200 U. S. 527, 26 Sup. Ct. 301, 50 L. ed. 581; *Clark v. Nash* (1905) 198 U. S. 361, 25 Sup. Ct. 676, 49 L. ed. 1085. And see *Noble State Bk. v. Haskell* (1911) 219 U. S. 104, 110, 575, 31 Sup. Ct. 186, 187, 188, 299, 55 L. ed. 112; *Bacon v. Walker* (1907) 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499; *Dickinson T. R.* (1903) 23 Pa. Super. 34; 5 Harv. L. Rev. 30. Compare *Cleveland E. Ry. Co. v. Cleveland & F. C. Ry. Co.* (1907) 204 U. S. 116, 27 Sup. Ct. 202, 51 L. ed. 399.

¹⁹³ See dissenting opinion in *Madisonville T. Co. v. St. Bernard M. Co.*

Whether a similar rule might be properly based upon the provision for the equal protection of the laws is a question which we need not consider in the present chapter.

Later cases.

125. We have noted at some length the reasons given for the decision in *Chicago, B. & Q. R. Co. v. Chicago*,¹⁹⁴ because that case is frequently cited in later cases as the authority for the proposition that the payment of just compensation when private property is taken for public use is essential to due process of law. In *Chicago, B. & Q. Ry. Co. v. People*,¹⁹⁵ however, in support of the statement that "The constitutional requirement of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If, in the execution of any power, no matter what it is, the government, federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner," the court cites merely three cases which relate strictly to the just compensation provision of the Fifth Amendment and one case which involves a provision for just compensation in a state constitution. Those cases obviously do not justify the making of such a statement by the court.¹⁹⁶

(1905) 196 U. S. 239, 260, 25 Sup. Ct. 251, 259, 49 L. ed. 462; 32 Am. L. Reg. N. S. 1, 7; 24 Harv. L. Rev. 378; 21 Harv. L. Rev. 277; *Hairston v. Danville & W. Ry. Co.* (1908) 208 U. S. 598, 606, 28 Sup. Ct. 331, 334, 52 L. ed. 637.

¹⁹⁴ (1897) 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979.

¹⁹⁵ (1906) 200 U. S. 561, 593, 26 Sup. Ct. 341, 350, 50 L. ed. 596.

¹⁹⁶ See also note 198, *infra*; and see reference in *Willcox v. Consolidated G. Co.* (1909) 212 U. S. 19, 44, 29 Sup. Ct. 192, 196, 53 L. ed. 382, to *Monongahela N. Co. v. United States* (1893) 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463, which arose under the Fifth Amendment.

General comment on position of court.

126. The opinions in a number of the cases in which the court has declared that the due process clause of the Fourteenth Amendment requires the payment of just compensation when private property is taken for public use¹⁹⁷ were written by a justice who declared repeatedly in dissenting opinions in other cases that the Fourteenth Amendment imposed upon the states the restraints which the first eight Amendments had imposed upon the federal government,¹⁹⁸ a position which the majority of the court has repeatedly repudiated.¹⁹⁹

And against the decisions which we have been considering under the present topic there may also be brought the further criticism that when the court declares that the due process provision of the Fourteenth Amendment includes a requirement of just compensation, then, unless that provision differs in meaning from the provision in the Fifth Amendment,²⁰⁰ the court necessarily assumes that the framers of the Fifth Amendment made an unnecessary provision when they secured due process and just compensation in separate terms, and that when the former provision was transferred to the Fourteenth Amendment and the latter was not the adopters of that

¹⁹⁷ E. g., *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U. S. 226, 17 Sup. Ct. 581, 41 L. ed. 979; *Chicago, B. & Q. Ry. Co. v. People* (1906) 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596; *Smyth v. Ames* (1898) 171 U. S. 361, 18 Sup. Ct. 488, 43 L. ed. 197, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Norwood v. Baker* (1898) 172 U. S. 269, 19 Sup. Ct. 187, 43 L. ed. 443.

¹⁹⁸ See, e. g., *Hurtado v. California* (1884) 110 U. S. 516, 4 Sup. Ct. 111, 292, 28 L. ed. 232; *O'Neil v. Vermont* (1892) 144 U. S. 323, 370, 12 Sup. Ct. 693, 711, 36 L. ed. 450; *Maxwell v. Dow* (1900) 176 U. S. 581, 20 Sup. Ct. 448, 494, 44 L. ed. 597; *Patterson v. Colorado* (1907) 205 U. S. 454, 27 Sup. Ct. 556, 51 L. ed. 879. See also note 163, *supra*.

¹⁹⁹ See, e. g., *Twining v. New Jersey* (1908) 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97.

²⁰⁰ On this point see secs. 54, 55, *supra*.

Amendment thought that they were securing the full protection of both provisions. And while the court has not considered it necessary to state these assumptions in express terms, much less to defend them, their validity is decidedly questionable.²⁰¹

TEXT AND CONTEXT.

The significance of the context.

127. On looking at the context of the due process clause of the Fifth Amendment it will be observed that the preceding clauses and the succeeding Amendment deal exclusively with the conduct of criminal trials, thus tending to show by mere association that the clause deals solely with procedure. Indeed, the only apparent objection to deriving this interpretation from the context lies in the fact that the due process clause is immediately followed by a provision that private property shall not be taken for public use without just compensation. And at first glance the presence of the just compensation provision seems to make it impossible to draw an interpretation of the due process clause from its context.

But if we consider the probability of some logical connection between contiguous clauses of the same Amendment and examine the provisions more closely with this thought in mind we shall see that the apparent difficulty is not a real one. If the due process clause, like the preceding clauses of the Fifth Amendment, deals with the conduct of criminal trials and with a taking by the pub-

²⁰¹ See cases in note 53, *supra*, and also *Fallbrook Irr. Dist. v. Bradley* (1896) 164 U. S. 112, 158, 17 Sup. Ct. 56, 63, 41 L. ed. 369; dissenting opinion in *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 465, 10 Sup. Ct. 462, 705, 33 L. ed. 970. In this connection, however, consider end of note 160, *supra*, with cases in note 158, *supra*.

lic in order to punish, it may be naturally followed by a provision relating to a taking by the public, not in order to punish but because the public wants the thing taken. There is just such a contrast in thought between the two clauses as to make it natural to place them together. And we must notice that only on that interpretation of the due process clause does it belong logically in that portion of the Constitution in which it was placed; and only on that interpretation of the due process clause was it logical to place the just compensation provision immediately after the due process provision.

Moreover, it is significant that it is not only in the Federal Constitution that the due process clause is so placed, but, as an able writer in the *Harvard Law Review* has declared with reference to the state constitutions also, the provision with which we are dealing is "in almost every instance inserted in a section of the constitution dealing exclusively with the conduct of criminal trials."²⁰²

And the reference to the deprivation of life in the due process clause shows clearly that the clause is one which relates to the enforcement of law.

The true meaning of the term "liberty."

128. The author whom we have just quoted has pointed out steps by which the provision of Magna Carta that "no freeman shall be taken or imprisoned . . . unless by the lawful judgment of his peers and"²⁰³ by the

²⁰² Shattuck, *The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty and Property,"* 4 *Harv. L. Rev.* 365, at 369. See also Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 *Harv. L. Rev.* 366, at 372; Boudin, *Government by Judiciary*, 26 *Pol. Sci. Quar.* 238, 265; *Green County v. Quinlan* (1909) 211 U. S. 582, 594, 29 *Sup. Ct.* 162, 167, 53 L. ed. 335.

²⁰³ On this word see McKechnie, *Magna Carta*, 436, 442, 443.

law of the land" has become our due process provision and shown that the term "liberty" when used in connection with the due process requirement means "nothing more or less than freedom of the person from restraint,—the great Habeas Corpus principle of Anglican liberty,—a right the illegal invasion of which gives rise to an action of false arrest or imprisonment."²⁰⁴ And he has, by an examination of other provisions of our constitutions, shown abundant reasons for saying that the term "liberty" was so understood when placed in this portion of the Federal Constitution.²⁰⁵

²⁰⁴ Ubi supra, 4 Harv. L. Rev. at 382; and see *ibid.* 376; Corwin, *ubi supra*, 24 Harv. L. Rev. 366, 372, 467, 468, 474; Hand, *Due Process of Law and the Eight Hour Day*, 21 Harv. L. Rev. 495.

²⁰⁵ Ubi supra, 4 Harv. L. Rev. at 369, 380-382. And on the meaning of the term "liberty" see also book review in 12 Harv. L. Rev. at 440; *Ex parte Boyce* (1904) 27 Nev. 299, 354, 75 Pac. 1, 12, 65 L. R. A. 47, 64; Baldwin, *The Courts as Conservators of Social Justice*, 9 Col. L. Rev. 567, 569. Compare Prentice, *Congress and the Regulation of Corporations*, 19 Harv. L. Rev. at 180 et seq.; *Mitchel v. Reynolds* (1711) 1 P. Williams, 181, 188; Coke, *Institutes*, II, *47; Corwin, *The Supreme Court and Unconstitutional Acts of Congress*, 4 Mich. L. Rev. at 626. The term "liberty" is also used in a different sense in English law as meaning a franchise or privilege: see McKechnie, *Magna Carta*, 445; *Dominus Rex v. Kilderby* (1671) 1 Saund. 312; Ritchie, *Natural Rights*, 7; 4 Harv. L. Rev. 372, note; *ibid.* 375. The meanings should no more be confused than should the general power of Congress to lay duties be construed as a general power to say what it shall be the duty of men to do. Nor should either meaning be confused with that which has been given to the term by the United States Supreme Court and which we shall consider at once. If the word "liberty" had a definite meaning when used in a due process provision, meanings which it had in other connections are irrelevant.—The connection in which a term is used is important. It is said that Dean Swift once based a sermon against the style of hair-dressing in favor with the women of his day upon that part of Matt. xxiv, 17 ("Let him which is on the house-top not come down to take anything out of his house") which reads "top-knot come down." So also a biographer of the great Chief Justice might say that *Magna Carta* was granted on the advice of John Marshall, and his statement would be literally true. On this see *Green County v. Quinlan* (1909) 211 U. S. 582, 594, 29 Sup. Ct. 162, 167, 53 L. ed. 335; 24 Harv. L. Rev. at 474.

The position of the court on the term "liberty."

129. The United States Supreme Court, however, in recent cases has given a far different interpretation to that term, and incidentally to the entire due process provision, both in the Fifth Amendment²⁰⁶ and in the Fourteenth Amendment,²⁰⁷ the court saying in *Allgeyer v. Louisi-*

²⁰⁶ *Adair v. United States* (1908) 208 U. S. 161, 28 Sup. Ct. 277, 52 L. ed. 436. Compare *Second Employers' Liability Cases—Mondou v. New Y., N. H. & H. R. Co.* (1912) 223 U. S. 1, 52, 32 Sup. Ct. 169, 176, 56 L. ed. 327; *Baltimore & O. R. Co. v. Interstate Com. Comn.* (1911) 221 U. S. 612, 619, 31 Sup. Ct. 621, 625, 55 L. ed. 878; *Lottery Case—Champion v. Ames* (1903) 188 U. S. 321, 357, 23 Sup. Ct. 321, 327, 47 L. ed. 492; *Addyston P. & S. Co. v. United States* (1899) 175 U. S. 211, 228, 229, 20 Sup. Ct. 96, 103, 44 L. ed. 136; *United States v. Joint T. Assn.* (1898) 171 U. S. 505, 572, 19 Sup. Ct. 25, 33, 43 L. ed. 259; and also *Buttfield v. Stranahan* (1904) 192 U. S. 470, 493, 24 Sup. Ct. 349, 354, 48 L. ed. 252.

²⁰⁷ *Allgeyer v. Louisiana* (1897) 165 U. S. 578, 589, 17 Sup. Ct. 427, 431, 41 L. ed. 832; *Lochner v. New York* (1905) 198 U. S. 45, 53, 25 Sup. Ct. 539, 541, 49 L. ed. 937; and see *Chicago, B. & Q. R. Co. v. McGuire* (1911) 219 U. S. 549, 567, 31 Sup. Ct. 259, 262, 55 L. ed. 328; *Brodnax v. Missouri* (1911) 219 U. S. 285, 293, 31 Sup. Ct. 238, 240, 55 L. ed. 219; *House v. Mayes* (1911) 219 U. S. 270, 284, 31 Sup. Ct. 234, 237, 55 L. ed. 213; *Grenada L. Co. v. Mississippi* (1910) 217 U. S. 433, 442, 30 Sup. Ct. 535, 539, 54 L. ed. 826; *Williams v. Arkansas* (1910) 217 U. S. 79, 30 Sup. Ct. 493, 54 L. ed. 673; *McLean v. Arkansas* (1909) 211 U. S. 539, 545, 29 Sup. Ct. 206, 207, 53 L. ed. 315; *Muller v. Oregon* (1908) 208 U. S. 412, 421, 28 Sup. Ct. 324, 326, 52 L. ed. 551; *Jacobson v. Massachusetts* (1905) 197 U. S. 11, 26, 29, 25 Sup. Ct. 358, 361, 362, 49 L. ed. 643; *Smiley v. Kansas* (1905) 196 U. S. 447, 456, 25 Sup. Ct. 289, 291, 49 L. ed. 546; *Booth v. Illinois* (1902) 184 U. S. 425, 428, 22 Sup. Ct. 425, 426, 46 L. ed. 623; *W. W. Cargill Co. v. Minnesota* (1901) 180 U. S. 452, 467, 21 Sup. Ct. 423, 429, 45 L. ed. 619; *Williams v. Fears* (1900) 179 U. S. 270, 274, 21 Sup. Ct. 128, 129, 45 L. ed. 186; *Mutual L. Co. v. Martell* (1911) 222 U. S. 225, 235, 32 Sup. Ct. 74, 75, 56 L. ed. 175; dissenting opinion in *Taylor and Marshall v. Beckham* (1900) 178 U. S. 548, 603, 20 Sup. Ct. 890, 1016, 44 L. ed. 1187. Compare *Northwestern N. L. I. Co. v. Riggs* (1906) 203 U. S. 243, 255, 27 Sup. Ct. 126, 129, 51 L. ed. 168; *Berea College v. Kentucky* (1908) 211 U. S. 45, 29 Sup. Ct. 33, 53 L. ed. 81; *Heath & Milligan Mfg. Co. v. Worst* (1907) 207 U. S. 338, 357, 28 Sup. Ct. 114, 120, 52 L. ed. 236; *Western T. Assn. v. Greenberg* (1907) 204 U. S. 359, 27 Sup. Ct. 384, 51 L. ed. 520; *Schmidinger v. Chicago* (1913) 226 U. S. 578, 589, 33 Sup. Ct. 182, 185, 57 L. ed. 364; *Atlantic C. L. R. Co. v. Riverside Mills* (1911) 219 U. S. 186, 202, 31 Sup. Ct. 164, 169, 55 L. ed. 167; *Noble*

ana²⁰⁸ that the liberty mentioned "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." While later decisions have made somewhat clearer the effect which the court gives to the term "liberty," the opinions usually refer back to the *Allgeyer* case.

Allgeyer v. Louisiana.

130. The importance of that decision, however, is weakened by the character of the opinion. The language which we have quoted shows confusion of thought. The court alternates between the omission and the use of the word "lawful" in the several phrases. The unqualified state-

State Bank v. Haskell (1911) 219 U. S. 104, 110, 111, 31 Sup. Ct. 186, 187, 188, 55 L. ed. 112.—Of decisions which were similar to that in *Lochner v. New York*, supra, Professor Seager has said that they have "implanted in the minds of workingmen a thorough distrust of the courts:" *The Attitude of American Courts Towards Restrictive Labor Laws*, 19 Pol. Sci. Quar. 589. See also G. W. Alger, *Moral Overstrain*, essay entitled "Some Equivocal Rights of Labor;" Seager, *Introduction to Economics*, sec. 236; Roe, *Our Judicial Oligarchy*, 10, 11, 15, 37; Pound, *Liberty of Contract*, 18 Yale L. Jour. 464, 487; Pound, *Common Law and Legislation*, 21 Harv. L. Rev. 383, 384; Alger, *The Old Law and the New Order*, 166, 167, 253, 254; Alger, *The Law and Industrial Inequality*, 7 The Brief, 1, 10, 11; White, *Government Control of Transportation Charges*, 38 Am. L. Reg. N. S. at 296; book review 24 Pol. Sci. Quar. 318, 319; Boudin, *Government by Judiciary*, 26 Pol. Sci. Quar. 238, 265, 266; editorial *The Menace of Law*, *The Independent*, Aug., 1912, 281.

²⁰⁸ (1897) 165 U. S. 578, 589, 17 Sup. Ct. 427, 431, 41 L. ed. 832.

ments of freedom from restraint are certainly incorrect, for it is clear that some restraints may constitutionally be imposed. And, on the other hand, the statement that men may do anything which is lawful, while obviously correct, does not solve the question under consideration, for it does not show what are the limitations upon the restraining power of the law-making department of government.

The decision in the *Allgeyer* case was based upon the language of Justice Bradley in *Butchers' U. Co. v. Crescent C. Co.*²⁰⁹ in an opinion which did not receive the approval of a majority of the court and which if approved would have meant the reversal of an earlier decision of the court from which Justice Bradley had dissented,²¹⁰ and upon a dictum which a justice who had concurred in Justice Bradley's opinion in the *Butchers' Union* case had placed in the opinion in *Powell v. Pennsylvania*.²¹¹ The bulk of the language quoted above was copied almost verbatim from an opinion of the New York Court of Appeals²¹² which in turn refers approvingly to the before-

²⁰⁹ (1884) 111 U. S. 746, 764, 765, 4 Sup. Ct. 652, 657, 658, 28 L. ed. 585. The use in the Declaration of Independence of the terms "liberty" and "pursuit of happiness" together certainly does not show that the meaning of the latter term, which is omitted from the due process clause, is included in the meaning of the former term.—It is not clear that the attitude towards government when the Fifth Amendment or the Fourteenth Amendment was adopted was precisely the same as that which from a few prefatory words in the Declaration of Independence we may possibly think was taken in 1776. Did the people who adopted those Amendments show no paternalistic sentiments through their representatives in Congress?

²¹⁰ Part of the language quoted in the *Allgeyer* case was directly in conflict with the decision in the *Slaughter House Cases* (1872) 16 Wall. 36, on a point concerning which the court said in *Twining v. New Jersey* (1908) 211 U. S. 78, 96, 29 Sup. Ct. 14, 18, 53 L. ed. 97, "This part at least of the *Slaughter House Cases* has been steadily adhered to by this court."

²¹¹ (1888) 127 U. S. 678, 684, 7 Sup. Ct. 992, 1257, 995, 32 L. ed. 253.

²¹² *In re Jacobs* (1885) 98 N. Y. 98. On the disastrous effect of the decision in the New York case see Kelley, *Some Ethical Gains Through Leg-*

mentioned opinion of Justice Bradley in the Butchers' Union case, to an opinion by the same justice in circuit court which declared unconstitutional a law which the Supreme Court afterwards declared constitutional, and to a **dissenting** opinion by Justice Field. No other remarks by justices of the United States Supreme Court on "liberty" are referred to in the opinion of the New York court.²¹³ There is, therefore, but little basis in precedent for the decision in the Allgeyer case.

CONCLUSION.

Position of the court criticised.

131. In reaching the interpretation which the court has given to the due process clauses it has been necessary for the court to ignore the presence in those clauses of the words "without due process of law," although the very phraseology of the provision shows that it was the intention of those who adopted the Amendments to permit the deprivation by due process of law of rights of which no person might be deprived otherwise.²¹⁴

islation, 253. See also Alger, *The Old Law and the New Order*, 166, 167; Roe, *Our Judicial Oligarchy*, 10, 11; Alger, *The Law and Industrial Equality*, 69 Alb. L. J. 121, 126.

²¹³ It may be added that the court does quote federal authorities on judicial inquiry, not into the exercise of the enumerated powers of Congress, but into the exercise of what are called the *implied* powers—inquiry whether powers which it is claimed are impliable from the enumerated powers of Congress are in reality so impliable. But it does not appear how the question, which is sometimes raised by federal statutes, can be raised by state legislation. Unless New York is different from most states, its legislature is unlike Congress in that the legislature has all powers which are not denied to it expressly or by necessary implication from grants to other departments of government. The bearing of those quotations upon state legislation is not apparent.—On implied powers see also note 119, *supra*.

²¹⁴ See Corwin, *The Doctrine of Due Process of Law Before the Civil*

Moreover, its interpretation was given without any consideration of the context of the due process provision. The court approached the question in dealing with the Fourteenth Amendment, where the context is not instructive. But as the context of the provision in the Fourteenth Amendment does not show that its meaning there is different from its meaning in the Fifth Amendment, it seems clear that any light which the context casts upon the meaning in the earlier Amendment should apply to the meaning in the subsequent Amendment, for the court interprets the clauses in both Amendments alike.²¹⁵ And not only has the court not considered the context of the due process provision, but it has not considered the historical meaning of the provision or even some of the earlier decisions of the court itself.²¹⁶

It is possible that if such matters were properly brought to the attention of the court the question would be re-examined. Certainly it is the duty of the court, when in-

War, 24 Harv. L. Rev. at 467, 468, 474; *Missouri P. Ry. Co. v. Humes* (1885) 115 U. S. 512, 520, 6 Sup. Ct. 110, 112, 29 L. ed. 463.

²¹⁵ See sec. 54, *supra*.

²¹⁶ See comment of C. E. Shattuck, in 4 Harv. L. Rev. at 386, on the decision in the *Slaughter House Cases* (1872) 16 Wall. 36: "The court did not, apparently, consider it even arguable that the restraint upon following their lawful calling was a deprivation of 'liberty.' Moreover, the decision does not rest, so far as this clause is concerned, upon the ground that the act was a fair exercise of the police power, and so was due process of law. It proceeds on the ground that the Fourteenth Amendment has no application whatever to such a right as that contended for, namely, the right of every man to pursue a lawful occupation. So that the actual decision in the case is against, rather than in favor of, the broad construction of the term 'liberty.'" See also the comment of that author on the decision in *Bradwell v. State* (1872) 16 Wall. 130, 21 L. ed. 442.—McGehee, *Due Process of Law*, 138 et seq., quotes in the text two passages from opinions of Justice Field which the notes show to be dissenting opinions; and Stimson, *Federal and State Constitutions of the United States*, 32, quotes from a dissenting opinion of Justice Field with the misstatement that it was the opinion of the court. The position which the court has taken in recent cases was not taken by the court in earlier cases.

interpreting provisions of the Constitution, to ascertain whether the terms had established meanings when placed in the Constitution and, if so, to apply them in accordance with those meanings.²¹⁷ And it seems clear that when the due process provision was placed in the Federal Constitution it referred simply to those deprivations which are usually made by way of punishment and that it referred simply to the procedure which must be observed in determining whether the law has been violated.

Should the court now take the correct position?

132. One point remains for our final consideration. It may be admitted that when the due process provision was placed in the Federal Constitution it did not refer to substantive law. It may be admitted that upon every occasion upon which the Supreme Court nullifies a law by declaring that the provision does deal with substantive law it assumes a power which those who adopted the provision never intended to bestow upon the court. And yet it may be claimed that the interpretation of the due process provision has been settled by repeated judicial decisions and that a change in its interpretation would result in a large amount of confusion.

In reply it is sufficient to point to the present state of the decisions concerning the due process clauses.²¹⁸ Would the law become more confused if the clauses were interpreted correctly? Or has "the gradual process of judicial inclusion and exclusion" along present lines already woven a tangled web of inconsistent decisions, which shows every sign of becoming more and more tangled as time goes on?

²¹⁷ See note 11 in Chapter 3, *supra*.

²¹⁸ See, e. g., secs. 70, 67, 63, 71, 92, 105, 106, *supra*.

CHAPTER V.

THE EQUAL PROTECTION PROVISION.

INTRODUCTORY.

- 133. The clause stated.
- 134. The organs of government restrained.
- 135. The "persons" protected.

GENERAL EXTENT OF RESTRAINT.

- 136. Clause forbids some state actions as well as omissions to act.
- 137. Discrimination which is forbidden.
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BEARING OF PROVISION ON RATE REGULATION.

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- 142. Power to limit rates.
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INTRODUCTORY.

The clause stated.

133. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

The organs of government restrained.

134. This provision obviously relates to the state governments and does not restrain the federal government.¹

¹ See sec. 53, *supra*.

It applies to action by the state itself through its constitution and it applies to action by any organ of state government. This is true whether the action is by the legislature or the judiciary or the officers of the central administration, although acts by municipalities or subordinate officers or private individuals, unless authorized or until supported by the state authorities, do not come within the purview of the Constitution.²

The "persons" protected.

135. The term "persons" in the equal protection provision includes natural persons as a matter of course. The court has also decided repeatedly that the term includes within its scope corporations, both domestic and foreign, although the rights of those corporations may be in some respects less than the rights of natural persons.³

GENERAL EXTENT OF RESTRAINT.

Clause forbids some state actions as well as omissions to act.

136. The main purpose of those who adopted the Fourteenth Amendment was doubtless to make sure that the states would give to the freedmen the same protection as it gave to other persons against oppression by their fellow-citizens.⁴ And in one respect this main purpose has

² The word "state" unquestionably has the same meaning in the equal protection clause as it has in the due process clause of the Fourteenth Amendment. Decisions showing its meaning in the latter clause are cited in section 58, *supra*.

³ See note 2, *supra*, and cases in section 57, *supra*.

⁴ See *Slaughter House Cases* (1872) 16 Wall. 36, 81, 21 L. ed. 394; *Ex parte Virginia* (1879) 100 U. S. 339, 344, 345, 25 L. ed. 676; *Plessy v. Ferguson* (1896) 163 U. S. 537, 543, 544, 16 Sup. Ct. 1138, 1140, 41 L. ed. 256; and also *Collins, The Fourteenth Amendment and the States*, 126, 127. It is true, however, that "of the six hundred and four cases involving the

been strictly observed. When, soon after the adoption of the Amendment, Congress, under color of its authority to enforce the provision by appropriate legislation, attempted to forbid discriminatory action by individuals, that legislation was declared unconstitutional. The court decided that the Amendment relates to the states and that it has no direct bearing upon the conduct of individuals.⁵

But in another direction the Amendment has been given a very sweeping effect. It has been held that the Amendment not only forbids the state to refuse to protect all persons equally against the misdeeds of their fellow-citizens but that it also forbids the state itself to take positive action which bears unequally upon those who are subject to its jurisdiction. This position has not always been stated felicitously. Thus it has been said that the equal protection of the laws means the protection of equal laws⁶—a statement which makes the position of the court depend upon a distortion of the wording of the Amendment. The same result, however, could be reached by a more correct course if we said that the state must not only afford to all persons equal protection against the acts of other persons but that it must also afford to all persons equal protection against the acts of its own representatives.

Fourteenth Amendment in which the Supreme Court has delivered opinions since 1868, only twenty-eight deal with questions involving the negro race; that is to say, less than five per cent of the total litigation under the Amendment:" Collins, *ubi supra*, 46, 47. "What positive gain has the operation of the Fourteenth Amendment been to the negro race? We can point to nothing:" Ibid. 76; see also 112, 129.

⁵ See note 25 in Chapter 3, *supra*. Compare Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 Mich. L. Rev. 643, 645.

⁶ See *German A. Ins. Co. v. Hale* (1911) 219 U. S. 307, 319, 31 Sup. Ct. 246, 249, 55 L. ed. 229; *Southern Ry. Co. v. Greene* (1910) 216 U. S. 400, 412, 30 Sup. Ct. 287, 289, 54 L. ed. 536.

Still, however the position of the court is stated, but few cases have arisen under the equal protection provision in which it has been contended that a state had violated the provision by a discrimination in the protection afforded against the actions of private individuals, and many cases have arisen in which it has been contended that organs of state government had by positive action injured some persons by improperly discriminating against them and had for that reason violated the equal protection provision, and in a number of cases such contentions have been sustained.

Discrimination which is forbidden.

137. We have, then, the general proposition that the equal protection provision forbids governmental action which discriminates unjustifiably against particular persons or classes of persons. Equal security must be given to all persons under like circumstances in the enjoyment of their personal and civil rights.⁷

It is true, as we shall see later on,⁸ that the legislature may enact legislation which is limited in its scope. It may classify the objects of legislation. But arbitrary selection can never be justified by calling it classification. The classification must be one which is based upon some difference which bears a proper relation to the attempted

⁷ *Southern Ry. Co. v. Greene* (1910) 216 U. S. 400, 412, 30 Sup. Ct. 287, 289, 54 L. ed. 536; *Raymond v. Chicago T. Co.* (1907) 207 U. S. 20, 28 Sup. Ct. 7, 52 L. ed. 78; *Connolly v. Union S. P. Co.* (1902) 184 U. S. 540, 22 Sup. Ct. 431, 46 L. ed. 679; *Cotting v. Kansas C. S. Y. Co.* (1901) 183 U. S. 79, 102, 22 Sup. Ct. 30, 40, 46 L. ed. 92; *Holden v. Hardy* (1898) 169 U. S. 366, 398, 18 Sup. Ct. 383, 390, 42 L. ed. 780; *Gulf, C. & S. F. Ry. Co. v. Ellis* (1897) 165 U. S. 150, 159, 165, 17 Sup. Ct. 255, 258, 261, 41 L. ed. 666.

⁸ Secs. 139, 140, 143, *infra*.

classification.⁹ It must not be a mere excuse for the oppression or spoliation of a particular class.¹⁰

Illustrations.

138. Thus, as was pointed out in a case which was cited with approval by the Supreme Court, "The legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature, or color of the hair."¹¹ So also, for example, it has been held that a state may not require a negro prisoner to submit to a trial by a jury from which negroes are excluded by reason of their race;¹² and a municipality may

⁹ *Gulf, C. & S. F. Ry. Co. v. Ellis* (1897) 165 U. S. 150, 159, 165, 17 Sup. Ct. 255, 258, 261, 41 L. ed. 666; *Cotting v. Kansas C. S. Y. Co.* (1901) 183 U. S. 79, 102, 22 Sup. Ct. 30, 40, 46 L. ed. 92. See also *Magoun v. Illinois T. & S. Bank* (1898) 170 U. S. 283, 294, 18 Sup. Ct. 594, 599, 42 L. ed. 1037. Compare sec. 140, *infra*.

¹⁰ *Holden v. Hardy* (1898) 169 U. S. 366, 398, 18 Sup. Ct. 383, 390, 42 L. ed. 780. See also cases in note 7, *supra*.

¹¹ See *State v. Loomis* (1892) 115 Mo. 307, 314, 22 S. W. 350, 351, 21 L. R. A. 789, cited in *Gulf, C. & S. F. Ry. Co. v. Ellis* (1897) 165 U. S. 150, 156, 17 Sup. Ct. 255, 257, 41 L. ed. 666.

¹² *Strauder v. West Virginia* (1879) 100 U. S. 303, 25 L. ed. 664; *Bush v. Kentucky* (1882) 107 U. S. 110, 1 Sup. Ct. 625, 27 L. ed. 354; *Carter v. Texas* (1900) 177 U. S. 442, 20 Sup. Ct. 687, 44 L. ed. 839; *Rogers v. Alabama* (1904) 192 U. S. 226, 24 Sup. Ct. 257, 48 L. ed. 417. See also *Ex parte Virginia* (1879) 100 U. S. 339, 25 L. ed. 676; *Brownfield v. South Carolina* (1903) 189 U. S. 426, 23 Sup. Ct. 513, 47 L. ed. 882. The prisoner, however, cannot go further than this and insist that the jury be composed, either in part or in whole, of men of his own race: *Martin v. Texas* (1906) 200 U. S. 316, 26 Sup. Ct. 338, 50 L. ed. 497; *Virginia v. Rives* (1879) 100 U. S. 313, 25 L. ed. 667; *Bush v. Kentucky* (1882) 107 U. S. 110, 1 Sup. Ct. 625, 27 L. ed. 354; *In re Shibuya Jugiro* (1891) 140 U. S. 291, 297, 11 Sup. Ct. 770, 772, 35 L. ed. 510; *Gibson v. Mississippi* (1896) 162 U. S. 565, 16 Sup. Ct. 904, 40 L. ed. 1075. See also *Franklin v. South Carolina* (1910) 218 U. S. 161, 30 Sup. Ct. 640, 54 L. ed. 980; *Thomas v. Texas* (1909) 212 U. S. 278, 29 Sup. Ct. 393, 53 L. ed. 512; *Tarrance v. Florida* (1903) 188 U. S. 519, 23 Sup. Ct. 402, 47 L. ed. 572; *Williams v. Mississippi* (1898) 170 U. S. 213, 18 Sup. Ct. 454, 42 L. ed. 1012.

not, in regulating business, make discriminations which are founded on differences of race.¹³ A classification for taxation which divides corporations doing exactly the same business with the same kind of property into foreign and domestic and subjects the foreign corporations to higher taxation denies to the foreign corporations the equal protection of the laws.¹⁴ And, to cite the cases in which we are most interested, a state may not require railroad companies to transport passengers or freight at rates which are unreasonably low, for in so far as such corporations are denied the right, while others are permitted, to receive reasonable profits upon their investments, those corporations are deprived of the equal protection of the laws.¹⁵

Classification which is permitted.

139. But while the provision forbids governmental ac-

¹³ *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. ed. 220.

¹⁴ *Southern Ry. Co. v. Greene* (1910) 216 U. S. 400, 412, 30 Sup. Ct. 287, 289, 54 L. ed. 536. Compare *Darnell v. Indiana* (1912) 226 U. S. 390, 398, 33 Sup. Ct. 120, 121, 57 L. ed. 267; *Selover, Bates & Co. v. Walsh* (1912) 226 U. S. 112, 125, 33 Sup. Ct. 69, 72, 57 L. ed. 146; *Aluminum Co. v. Ramsey* (1911) 222 U. S. 251, 256, 32 Sup. Ct. 76, 77, 56 L. ed. 185.

¹⁵ *Ex parte Young* (1908) 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. N. S. 932; *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858; *Smyth v. Ames* (1898) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Reagan v. Mercantile T. Co.* (1894) 154 U. S. 413, 418, 14 Sup. Ct. 1060, 1062, 38 L. ed. 1028; *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970; *Montana, W. & S. R. Co. v. Morley* (1912) 198 Fed. 991. See also *Railroad Comn. of La. v. Cumberland T. & T. Co.* (1909) 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577. Compare *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 22 Sup. Ct. 95, 46 L. ed. 298; *Minneapolis & St. L. R. Co. v. Minnesota* (1903) 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151; and also *Norfolk & S. T. Co. v. Virginia* (1912) 225 U. S. 264, 32 Sup. Ct. 828, 56 L. ed. 1082, the last of which arose under the due process clause of the Fourteenth Amendment.

tion which discriminates unjustifiably against particular persons or classes of persons, it does not limit the state to governmental action which affects alike all persons who are subject to its jurisdiction.¹⁶ It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate,¹⁷ if within the sphere of its operation the legisla-

¹⁶ It does "not radically change the whole theory of the relation of the state and federal governments to each other, and of both governments to the people:" see note 51, in Chapter 4, *supra*. On the power to enact special legislation see *Magoun v. Illinois T. & S. Bank* (1898) 170 U. S. 283, 294, 18 Sup. Ct. 594, 599, 42 L. ed. 1037; *Central L. Co. v. South Dakota* (1912) 226 U. S. 157, 161, 33 Sup. Ct. 66, 67, 57 L. ed. 164.

¹⁷ *Magoun v. Illinois T. & S. Bank* (1898) 170 U. S. 283, 293, 294, 18 Sup. Ct. 594, 598, 599, 42 L. ed. 1037. See also *Patterson, The United States and the States Under the Constitution*, 2d ed., p. 314. The Amendment does not compel the legislature "to run all its laws in the channels of general legislation:" *Bachtel v. Wilson* (1907) 204 U. S. 36, 41, 27 Sup. Ct. 243, 245, 51 L. ed. 357. "When there is a difference it need not be great or conspicuous in order to warrant classification:" *Keeney v. New York* (1912) 222 U. S. 525, 537, 32 Sup. Ct. 105, 107, 55 L. ed. 299. "If an evil is specially experienced in a particular branch of business, the Constitution embodies no prohibition of laws confined to the evil, or doctrinaire requirement that they should be couched in all-embracing terms. It does not forbid the cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation:" *Carroll v. Greenwich Ins. Co.* (1905) 199 U. S. 401, 411, 26 Sup. Ct. 66, 67, 50 L. ed. 246; see also *Lindsley v. Natural C. G. Co.* (1911) 220 U. S. 61, 81, 31 Sup. Ct. 337, 341, 55 L. ed. 369. "We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights:" *Noble State Bank v. Haskell* (1911) 219 U. S. 104, 110, 31 Sup. Ct. 186, 187, 55 L. ed. 112. "You cannot carry a constitution out with mathematical nicety to logical extremes:" *Paddell v. City of New York* (1908) 211 U. S. 446, 450, 29 Sup. Ct. 139, 140, 53 L. ed. 275. "Tradition and the habits of the community count for more than logic:" *Laurel Hill Cemetery v. San Francisco* (1910) 216 U. S. 358, 366, 30 Sup. Ct. 301, 302, 54 L. ed. 515. "The general expressions of the Amendment must not be allowed to upset familiar and long-established methods and processes by a formal elaboration of rules which its words do not import:" *Hatch v. Reardon* (1907) 204 U. S. 152, 158, 27 Sup. Ct. 188, 189,

tion affects alike all persons and property similarly situated.¹⁸ The Amendment does not forbid the state legislatures to classify the objects of legislation.

Wide range of legislative discretion.

140. And in making classifications a wide scope of legislative discretion may be exerted.¹⁹ The provision does not restrain the normal exercise of governmental power, and, therefore, even if some inequality results a law is not for that reason unconstitutional.²⁰ If the classification rests upon some reasonable consideration of difference or policy there is no denial of the equal protection of

51 L. ed. 415; see also *Louisville & N. R. Co. v. Barber A. P. Co.* (1905) 197 U. S. 430, 434, 25 Sup. Ct. 466, 467, 49 L. ed. 819; *Southern I. Ry. Co. v. Railroad Comm.* (1909) 172 Ind. 113, 127, 87 N. E. 966, 971. And see note 24, *infra*; *Sperry & Hutchinson Co. v. Rhodes* (1911) 220 U. S. 502, 505, 31 Sup. Ct. 490, 491, 55 L. ed. 561; *Denver v. New Y. T. Co.* (1913) 229 U. S. 123, 143, 33 Sup. Ct. 657, 666, 57 L. ed. 1101; *Citizens' T. Co. v. Fuller* (1913) 229 U. S. 322, 33 Sup. Ct. 833, 57 L. ed. 1206; *Chicago D. & C. Co. v. Fraley* (1913) 228 U. S. 680, 686, 33 Sup. Ct. 715, 716, 57 L. ed. 1022; *Schmidinger v. Chicago* (1913) 226 U. S. 578, 586, 33 Sup. Ct. 182, 183, 57 L. ed. 364; *Rosenthal v. New York* (1912) 226 U. S. 261, 271, 33 Sup. Ct. 27, 30, 57 L. ed. 212; *Kentucky U. Co. v. Kentucky* (1911) 219 U. S. 140, 161, 31 Sup. Ct. 171, 180, 55 L. ed. 137; *Ozan L. Co. v. Union C. N. Bk.* (1907) 207 U. S. 251, 256, 28 Sup. Ct. 89, 91, 52 L. ed. 195; *State v. Sutton* (1912) 84 N. J. L., 84 Atl. 1057, 1059.

¹⁸ *German A. Ins. Co. v. Hale* (1911) 219 U. S. 307, 319, 31 Sup. Ct. 246, 249, 55 L. ed. 229; *Williams v. Arkansas* (1910) 217 U. S. 79, 90, 30 Sup. Ct. 493, 495, 54 L. ed. 673; *Barbier v. Connolly* (1885) 113 U. S. 27, 32, 5 Sup. Ct. 357, 360, 28 L. ed. 923.

¹⁹ *Louisville & N. R. Co. v. Melton* (1910) 218 U. S. 36, 52, 30 Sup. Ct. 676, 680, 54 L. ed. 921; *Central L. Co. v. South Dakota* (1912) 226 U. S. 157, 160, 33 Sup. Ct. 66, 67, 57 L. ed. 164; *Brown-Forman Co. v. Kentucky* (1910) 217 U. S. 563, 573, 30 Sup. Ct. 578, 580, 54 L. ed. 883; *Magoun v. Illinois T. & S. Bank* (1898) 170 U. S. 283, 293, 294, 18 Sup. Ct. 594, 598, 599, 42 L. ed. 1037; and see citations in remainder of this section.

²⁰ *Louisville & N. R. Co. v. Melton* (1910) 218 U. S. 36, 52, 30 Sup. Ct. 676, 680, 54 L. ed. 921. "The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality." *Atchison, T. & S. F. R. Co. v. Matthews* (1899) 174 U. S. 96, 106, 19 Sup. Ct. 609, 613, 43 L. ed. 909.

the laws.²¹ Moreover, a classification need not be scientific nor logically appropriate. If it is not palpably arbitrary, but is uniform within the class, it is constitutional.²²

²¹ *Brown-Forman Co. v. Kentucky* (1910) 217 U. S. 563, 573, 30 Sup. Ct. 578, 580, 54 L. ed. 883; *Rosenthal v. New York* (1912) 226 U. S. 260, 270, 33 Sup. Ct. 27, 30, 57 L. ed. 212. "The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class;" *Holden v. Hardy* (1898) 169 U. S. 366, 398, 18 Sup. Ct. 383, 390, 42 L. ed. 780.—"A state does not deny the equal protection of the laws merely by adjusting its revenue laws and taxing system in such a way as to favor certain industries or forms of industry. Like the United States, although with more restriction and in less degree, a state may carry out a policy, even a policy with which we might disagree. It may make discriminations, if founded on distinctions which we cannot pronounce unreasonable and purely arbitrary;" *Quong Wing v. Kirkendall* (1912) 223 U. S. 59, 62, 32 Sup. Ct. 192, 193, 56 L. ed. 350. And see cases there cited; *Central L. Co. v. South Dakota* (1912) 226 U. S. 157, 160, 33 Sup. Ct. 66, 67, 57 L. ed. 164; *Griffith v. Connecticut* (1910) 218 U. S. 563, 31 Sup. Ct. 132, 54 L. ed. 883; *Michigan C. R. Co. v. Powers* (1906) 201 U. S. 245, 293, 26 Sup. Ct. 459, 462, 50 L. ed. 744; *Barbier v. Connolly* (1885) 113 U. S. 27, 31, 32, 5 Sup. Ct. 357, 359, 360, 28 L. ed. 923; and cases in notes 34-39, *infra*.

²² *Mutual L. Co. v. Martell* (1911) 222 U. S. 225, 235, 32 Sup. Ct. 74, 75, 56 L. ed. 175. "Classification must have relation to the purpose of the legislature. But logical appropriateness of the inclusion or exclusion of objects or persons is not required. . . . Exact wisdom and nice adaptation are not required by the Fourteenth Amendment, nor the crudeness nor the impolicy nor even the injustice of state laws redressed by it;" *Heath & Milligan Mfg. Co. v. Worst* (1907) 207 U. S. 338, 354, 28 Sup. Ct. 114, 119, 52 L. ed. 236. "The selection, in order to become obnoxious to the Fourteenth Amendment, must be arbitrary and unreasonable; not merely possibly, but clearly and actually so;" *Bachtel v. Wilson* (1907) 204 U. S. 36, 41, 27 Sup. Ct. 243, 245, 51 L. ed. 357. "Classification . . . is not invalid because not depending on scientific or marked differences in things or persons in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary;" *Orient Ins. Co. v. Daggs* (1899) 172 U. S. 557, 562, 19 Sup. Ct. 281, 282, 43 L. ed. 552. "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts;" *Missouri, K. & T. Ry. Co. v. May* (1904) 194 U. S. 267, 270, 24 Sup. Ct. 638, 639, 48 L. ed. 971. There

While the court may, within the limits pointed out, inquire whether the classification is based on justifiable distinctions, considering the purpose of the law and the means to be observed to effect that purpose,²³ the legislature is the only judge of the policy of a proposed discrimination. When it has decided upon a measure, its action cannot be disturbed by the courts under the Fourteenth Amendment unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.²⁴

is "no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things:" *Magoun v. Illinois T. & S. Bank* (1898) 170 U. S. 283, 296, 18 Sup. Ct. 594, 599, 42 L. ed. 1037. The provision "at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority:" *Campbell v. California* (1906) 200 U. S. 87, 95, 26 Sup. Ct. 182, 185, 50 L. ed. 382. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of judgment are not subject to our judicial review:" *Metropolis T. Co. v. Chicago* (1913) 228 U. S. 61, 69, 70, 33 Sup. Ct. 441, 443, 57 L. ed. 730. See also *Keeney v. New York* (1912) 222 U. S. 525, 537, 32 Sup. Ct. 105, 107, 56 L. ed. 299; *Louisville & N. R. Co. v. Melton* (1910) 218 U. S. 36, 55, 30 Sup. Ct. 676, 681, 54 L. ed. 921; and note 17, *supra*.

²³ See *St. John v. New York* (1906) 201 U. S. 633, 636, 26 Sup. Ct. 554, 555, 50 L. ed. 896; *Southern Ry. Co. v. Greene* (1910) 216 U. S. 400, 417, 30 Sup. Ct. 287, 291, 54 L. ed. 536; *Holden v. Hardy* (1898) 169 U. S. 366, 398, 18 Sup. Ct. 383, 390, 42 L. ed. 780; *Gulf, C. & S. F. Ry. Co. v. Ellis* (1897) 165 U. S. 150, 155, 159, 165, 17 Sup. Ct. 255, 257, 258, 261, 41 L. ed. 666.

²⁴ *Williams v. Arkansas* (1910) 217 U. S. 79, 90, 30 Sup. Ct. 493, 495, 54 L. ed. 673; *Barrett v. Indiana* (1913) 229 U. S. 26, 30, 33 Sup. Ct. 692, 693, 57 L. ed. 1050; *Citizens' T. Co. v. Fuller* (1913) 229 U. S. 322, 33 Sup. Ct. 833, 57 L. ed. 1206; *Chicago D. & C. Co. v. Fraley* (1913) 228 U. S. 680, 686, 33 Sup. Ct. 715, 716, 57 L. ed. 1022; *Mutual L. Co. v. Martell* (1911) 222 U. S. 225, 235, 236, 32 Sup. Ct. 74, 75, 56 L. ed. 175; *Lindale v. Natural C. G. Co.* (1911) 220 U. S. 61, 78, 31 Sup. Ct. 337, 340, 55 L. ed.

BEARING OF PROVISION ON RATE REGULATION.**In general.**

141. We shall not attempt to consider in detail the decisions of the court under the equal protection provision.²⁵ It is sufficient to note merely those which have the most direct bearing upon rate regulation.

We have already seen that a state may not require railroad companies to transport passengers or freight at rates which are unreasonably low.²⁶ This statement is indefinite, for it does not show precisely what are the limits to rate regulation, but it must suffice for the present. In a subsequent chapter²⁷ we shall consider at length the rules which are observed by the court in determining whether or not rates are so low as to be unconstitutional.

Power to limit rates.

142. The provision, it has been held, does not forbid the states to place limitations upon the charges for railroad transportation;²⁸ the state may limit the rates of water

369; *Home T. & T. Co. v. Los Angeles* (1906) 211 U. S. 265, 280, 281, 29 Sup. Ct. 50, 55, 53 L. ed. 176; *Missouri, K. & T. Ry. Co. v. May* (1904) 194 U. S. 267, 269, 24 Sup. Ct. 638, 639, 48 L. ed. 971; *Finley v. California* (1911) 222 U. S. 28, 32 Sup. Ct. 13, 56 L. ed. 75; see also *Bradley v. Richmond* (1913) 227 U. S. 477, 33 Sup. Ct. 318, 57 L. ed. 603; *Metropolis T. Co. v. Chicago* (1913) 228 U. S. 61, 70, 33 Sup. Ct. 441, 443, 57 L. ed. 730; and language of Holmes, J., in *Interstate C. S. Ry. Co. v. Commonwealth* (1907) 207 U. S. 79, 85, 28 Sup. Ct. 26, 27, 52 L. ed. 111. Compare *Louisville & N. R. Co. v. Railroad Comn.* (1912) 196 Fed. 800, 818.

²⁵ Many decisions are cited in *Patterson, The United States and the States Under the Constitution*, 2d ed., sec. 131.

²⁶ See note 15, *supra*.

²⁷ Chapter 6, *infra*.

²⁸ *St. Louis & S. F. Ry. Co. v. Gill* (1895) 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567; *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Smyth v. Ames* (1898) 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 197; *Atlantic C. L. R. Co. v. Florida* (1906) 203 U. S. 256, 27 Sup. Ct. 108, 51 L. ed. 174; *Minneapolis & St. L. R. Co. v. Min-*

supply companies,²⁹ gas companies³⁰ and telephone companies,³¹ and it may fix the tolls which may be charged by turnpike companies,³² and the rates which may be charged by grain elevator companies.³³

Classification of railroads for rate regulation.

143. Moreover, a state may classify its railroads for the purpose of rate regulation. Thus it may place limitations upon roads over a stated length which do not apply to roads under that length;-³⁴ it may place limitations upon roads in one part of the state which do not apply to roads

nesota (1902) 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151. See also *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417; *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 22 Sup. Ct. 95, 46 L. ed. 298.

²⁹ *Stanislaus County v. San Joaquin & K. R. C. & I. Co.* (1904) 192 U. S. 201, 24 Sup. Ct. 241, 48 L. ed. 406.

³⁰ *Cedar R. G. L. Co. v. Cedar Rapids* (1912) 223 U. S. 655, 32 Sup. Ct. 389, 56 L. ed. 594; *Willecox v. Consolidated G. Co.* (1909) 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382.

³¹ *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 29 Sup. Ct. 50, 53 L. ed. 176.

³² *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560.

³³ *Munn v. Illinois* (1876) 94 U. S. 113, 24 L. ed. 77; *Budd v. New York* (1892) 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247; *Brass v. North Dakota* (1894) 153 U. S. 391, 14 Sup. Ct. 857, 38 L. ed. 757.

³⁴ *Dow v. Beidelman* (1888) 125 U. S. 680, 8 Sup. Ct. 1028, 31 L. ed. 841; *Chesapeake & O. Ry. Co. v. Conley* (1913) 230 U. S. 513, 33 Sup. Ct. 985, 57 L. ed. 1597. See also *Consumers' League v. Colorado & S. Ry. Co.* (1912) 53 Colo. 54, 125 Pac. 577; *Southern Ry. Co. v. Hunt* (1908) 42 Ind. App. 90, 102 et seq., 83 N. E. 721, 726, 727. In *New Y., N. H. & H. R. Co. v. New York* (1897) 165 U. S. 628, 17 Sup. Ct. 418, 41 L. ed. 853, it was held that a state may regulate the heating of steam passenger cars, although at the same time it declares that the regulations shall not apply to railroads less than fifty miles in length; and in *Chicago, R. I. & P. Ry. Co. v. Arkansas* (1911) 219 U. S. 453, 31 Sup. Ct. 275, 55 L. ed. 290, the court sustained a full crew law which did not apply to railroads less than fifty miles in length. Compare *Louisville & N. R. Co. v. Railroad Comn. of Alabama* (1912) 196 Fed. 800, 817.

in another portion;³⁵ and it may classify its railroads according to the amount³⁶ or character³⁷ of business transacted.³⁸ And the state may even make rate regulations which apply only to particular roads.³⁹

³⁵ *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560. See also *Budd v. New York* (1892) 143 U. S. 517, 12 Sup. Ct. 468, 36 L. ed. 247; *Railroad Co. v. Richmond* (1877) 96 U. S. 521, 24 L. ed. 734; *Gardner v. Michigan* (1905) 199 U. S. 325, 26 Sup. Ct. 106, 50 L. ed. 212; *Missouri v. Lewis* (1879) 101 U. S. 22, 25 L. ed. 989. Compare *Louisville & N. R. Co. v. Railroad Comn. of Alabama* (1912) 196 Fed. 800, 817.

³⁶ *Chicago, B. & Q. R. Co. v. Iowa* (1876) 94 U. S. 155, 163, 164, 24 L. ed. 94 (affirming *Chicago, B. & Q. R. Co. v. Attorney-General* (1875) Fed. Cas. No. 2666); *Wellman v. Chicago & G. T. Ry. Co.* (1890) 83 Mich. 592, 47 N. W. 489; *Citizens' T. Co. v. Fuller* (1913) 229 U. S. 322, 33 Sup. Ct. 833, 57 L. ed. 1206. See also *Coal & C. Ry. Co. v. Conley* (1910) 67 W. Va. 129, 67 S. E. 613.

³⁷ *Consumers' League v. Colorado & S. Ry. Co.* (1912) 53 Colo. 54, 125 Pac. 577; *Southern Ry. Co. v. Hunt* (1908) 42 Ind. App. 90, 102-106, 83 N. E. 721, 726, 727. See also *Chesapeake & O. Ry. Co. v. Conley* (1913) 230 U. S. 513, 33 Sup. Ct. 985, 57 L. ed. 1597; *Engel v. O'Malley* (1911) 219 U. S. 128, 138, 31 Sup. Ct. 190, 193, 55 L. ed. 128; *People v. New Y. S. B. of T. Comrs.* (1905) 199 U. S. 1, 47, 25 Sup. Ct. 705, 713, 50 L. ed. 65; *Savannah, T. & I. of H. Ry. v. Savannah* (1905) 198 U. S. 392, 25 Sup. Ct. 690, 49 L. ed. 1097; *Metropolis T. Co. v. Chicago* (1913) 228 U. S. 61, 33 Sup. Ct. 441, 57 L. ed. 730.

³⁸ Compare *Louisville & N. R. Co. v. Railroad Comn. of Alabama* (1912) 196 Fed. 800, 817.

³⁹ *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 280, 29 Sup. Ct. 50, 55, 53 L. ed. 176; *Southern I. Ry. Co. v. Railroad Comn.* (1909) 172 Ind. 113, 127, 87 N. E. 966, 971; *Houston & T. C. R. Co. v. Storey* (1906) 149 Fed. 499, 504. See also *Ames v. Union P. Ry. Co.* (1894) 64 Fed. 165. Compare *Houston & T. C. R. Co. v. Storey*, *supra*, and also *Cotting v. Kansas C. S. Y. Co.* (1901) 183 U. S. 79, 102, 22 Sup. Ct. 30, 40, 46 L. ed. 92, in the latter of which the court declared unconstitutional a statute which, although general in its terms, was designed to limit the charges of a single stock yards company and which did not limit the charges which might be made by similar companies doing less business. It is questionable, however, whether the business of the stock yards company was so far analogous to that of a railroad company that the decision would be applicable to cases of railroad transportation.

Other regulation of railroads.

144. So also a state may forbid its railroads to charge more for a shorter than for a longer haul including the same route except by permission of the railroad commission.⁴⁰

And a state may require the railroad companies to meet the expenses of the state railroad commission,⁴¹ and the electric companies to meet the salaries of the subway commissioners.⁴² Neither requirement, it has been held, violates the equal protection provision.

EXCESSIVE PENALTIES.

145. The court has, however, declared unconstitutional a statute which imposed upon railroads and railroad employees who should exact higher rates than were ordained by the state penalties which would be so large in the aggregate that the railroads and their employees would comply with the statutes and orders relating to rates rather than contest the validity of the rates in actions at law.⁴³

⁴⁰ *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 22 Sup. Ct. 95, 46 L. ed. 298. See also *Alabama & V. Ry. Co. v. Mississippi R. Comn.* (1906) 203 U. S. 496, 27 Sup. Ct. 163, 51 L. ed. 289, which arose under the due process provision of the Fourteenth Amendment.

⁴¹ *Charlotte, C. & A. R. Co. v. Gibbes* (1892) 142 U. S. 386, 12 Sup. Ct. 255, 35 L. ed. 1051. See also *St. Mary's F.-A. P. Co. v. West Virginia* (1906) 203 U. S. 183, 27 Sup. Ct. 132, 51 L. ed. 144.

⁴² *New York v. Squires* (1892) 145 U. S. 175, 12 Sup. Ct. 880, 36 L. ed. 666.

⁴³ *Ex parte Young* (1908) 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. N. S. 932. See also *Missouri P. Ry. Co. v. Tucker* (1913) 230 U. S. 340, 33 Sup. Ct. 961, 57 L. ed. 1507; *Southern P. Co. v. Campbell* (1913) 230 U. S. 537, 33 Sup. Ct. 1027, 57 L. ed. 1610; *Willcox v. Consolidated G. Co.* (1909) 212 U. S. 19, 53, 54, 29 Sup. Ct. 192, 200, 53 L. ed. 382; *Portland Ry., L. & P. Co. v. Portland* (1912) 201 Fed. 119; *Ex parte Wood* (1907) 155 Fed. 190 (affirmed in *Hunter v. Wood* (1908) 209 U. S. 205, 28 Sup. Ct. 472, 52 L. ed. 747); *Consolidated G. Co. v. Mayer* (1906) 146 Fed. 150.

The court was not satisfied to take the position that if the rates imposed were so low that for that reason they would be unconstitutional their enforcement might under the circumstances be restrained by an action in equity in a federal court. It went further and said that the fact that such large penalties were imposed of itself was sufficient to render the act unconstitutional as denying to the railroads and the railroad employees the equal protection of the laws.

The reasons advanced in support of the decision are in part at least very unsatisfactory.⁴⁴ It seems, however, that the decision may be properly based upon the provision for the equal protection of the laws.

Compare *Waters-Pierce Oil Co. v. Texas* (1909) 212 U. S. 86, 111, 29 Sup. Ct. 220, 227, 53 L. ed. 417; *Weams v. United States* (1910) 217 U. S. 349, 30 Sup. Ct. 544, 54 L. ed. 793; *Boise A. H. & C. W. Co. v. Boise City* (1909) 213 U. S. 276, 29 Sup. Ct. 426, 53 L. ed. 796; *Excessive Penalties Affecting the Validity of Maximum Rate Legislation*, 70 Cent. L. J. 381; *O'Neil v. Vermont* (1892) 144 U. S. 323, 12 Sup. Ct. 693, 36 L. ed. 450. In the case last cited heavy penalties were imposed: the equal protection provision, however, was not invoked. See also note 46, *infra*.

⁴⁴ The court takes the position that until it has passed upon a law or order limiting rates the essential steps in its enactment have not been fully complied with. Thus the opinion does not show a clear realization of the fact that rate regulation is not judicial in its nature: see discussion in sections 32-34, 51, 60, *supra*. And the court quotes with approval the following peculiar language in *Cotting v. Kansas C. S. Y. Co.* (1901) 183 U. S. 79, 102, 22 Sup. Ct. 30, 39, 40, 46 L. ed. 92, "It is doubtless true that the state may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented."—Compare *Roe, Our Judicial Oligarchy*, 63-68; *Southern Ry. Co. v. Hunt* (1908) 42 Ind. App. 90, 99, 83 N. E. 721, 725; *Smalley, Railroad Rate Control* (Publications of the American Econ. Assn.) 114-117; *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 16, 29 Sup. Ct. 148, 153, 53 L. ed. 371; *Louisville & N. R. Co. v. Railroad Comm.* (1912) 196 Fed. 800 (where the case was pending five years); *Collins, The Fourteenth Amendment and the States*, 132, 136, 154, 158; *Hadley, The Eleventh Amendment*, 66 Cent. L. J. 71, 76; *Ransom, Majority Rule and the Judiciary*, 62; note 35 in Chapter 6, *infra*.

And the court might have passed over any discussion of the Fourteenth Amendment and said broadly that where the constitutionality of a statute is involved—in this case, e. g., upon the ground that the rates imposed were so low as to be unconstitutional for that reason—there is a right to resort to a federal court which does not rest upon state legislation and which a state cannot take away, and for the exercise of which a state cannot penalize a litigant.⁴⁵ Or the court might have so construed the statute that the penal clause became wholly inapplicable to a railroad company upon the institution by it, in good faith, of a suit to test the validity of the act, or have held that if the penal clause were void for obstruction of remedy it was not void to all intents and purposes, but only in so far as it so operated.⁴⁶

REASONABLENESS AND JUST COMPENSATION.

146. We have already examined the proposition that the due process clause of the Fourteenth Amendment prohibits the enactment of substantive legislation which is clearly unreasonable⁴⁷ and the proposition that that clause prohibits the taking of private property for public use

⁴⁵ See *Herndon v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 135, 158, 30 Sup. Ct. 633, 639, 54 L. ed. 970; and also *Seaboard A. L. Ry. Co. v. Railroad Comn.* (1907) 155 Fed. 792; Singewald, *The Doctrine of Non-suability of the State in the United States*, 28 Johns Hopkins University Studies, 93. Consider discussion in sec. 22, *supra*, on the proper limits of this proposition. But compare Singewald, *op. cit.*, 101, where the position is taken that federal statutes forbid federal courts to take such action as was taken in *Ex parte Young*.

⁴⁶ See *Coal & C. Ry. Co. v. Conley* (1910) 67 W. Va. 129, 157, 67 S. E. 613, 625, where the court takes this position and supports it with discussion; and also *Chesapeake & O. Ry. Co. v. Conley* (1913) 230 U. S. 513, 33 Sup. Ct. 985, 57 L. ed. 1597; *Excessive Penalties Affecting the Validity of Maximum Rate Legislation*, 70 Cent. L. J. 381.

⁴⁷ See secs. 105-118, *supra*.

without just compensation,⁴⁸ and we have seen that no sufficient reason has been advanced in support of either proposition.

It seems, however, that the court might with far more propriety declare that the equal protection provision authorizes the court to inquire whether substantive state legislation which is not universal in its scope is clearly unreasonable,⁴⁹ and that that provision requires the payment of just compensation when private property is taken for public use. It is not justifiable for the court, without advancing strong reasons for its position, to say that the due process provision of the Fourteenth Amendment includes a requirement of just compensation, in view of the fact that the Fifth Amendment provides for due process and just compensation separately.⁵⁰ But there is no such objection to reaching the conclusion, through lines of reasoning which are not difficult, that the equal protection provision is more comprehensive than the earlier provision for just compensation, that it includes a requirement of just compensation, and that therefore it was not necessary to express the just compensation requirement in a separate provision as was done in the Fifth Amendment.

We must, however, remember that the court has said that the Fourteenth Amendment was not intended to change the whole theory of the relations of the state and federal governments to each other and of both governments to the people.⁵¹

⁴⁸ See secs. 119-126, *supra*.

⁴⁹ See sec. 111, *supra*.

⁵⁰ See secs. 88, 126, *supra*.

⁵¹ See note 51 in Chapter 4, *supra*. Consider also Money, *On the Question of the Validity of the Fourteenth Amendment to the Constitution*, 71 Cent. L. J. 112; note in 30 Am. L. Rev. 894-897.

CHAPTER VI.

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INTRODUCTORY.

Provision in Fifth Amendment.

147. The Fifth Amendment contains the provision "nor shall private property be taken for public use without just compensation." This clause, of course, applies only to the organs of the federal government.¹ And apparently no decision of the Supreme Court in rate cases has ever been based upon it.

Due process and just compensation.

148. The court has, however, frequently declared that a similar requirement of just compensation is placed upon the states by the due process clause of the Fourteenth Amendment;² and presumably it would hold that the due process clause of the Fifth Amendment places a similar restraint upon the federal government.³ While the reasons advanced in support of this position are unconvincing,⁴ such is the position of the court.

Equal protection and just compensation.

149. We have also pointed out that the court might

¹ See Chapter 3, notes 1, 2, 21 et seq.

² See Chapter 4, note 160 et seq.

³ See Chapter 3, note 6.

⁴ See secs. 119-126, *supra*.

more properly base upon the equal protection provision its decision that a state may not take private property for public use without just compensation.⁵

Bearing of requirement upon rate regulation.

150. This requirement, it has been held, while it does not take away the power of the government to reduce railroad rates,⁶ does limit that power.⁷ The extent to which the power is limited is discussed in a number of cases which were decided under the due process provision or the equal protection provision; but as the decisions to which we shall now refer are all based upon the proposition that the Constitution requires the payment of just compensation when private property is taken for public use, those decisions may be examined most appropriately in the present chapter.

Unreasonable or discriminatory regulations.

151. It is conceivable that rates which would yield what abstractly considered would be just compensation to the carrier might be in other respects so unreasonable

⁵ See secs. 146, 136, *supra*.

⁶ See sec. 142, *supra*; 22 Harv. L. Rev. at 263; *Munn v. Illinois* (1874) 94 U. S. 113, 125, 24 L. ed. 77; *Railroad Co. v. Richmond* (1877) 96 U. S. 521, 529, 24 L. ed. 734; *Transportation Co. v. Chicago* (1878) 99 U. S. 635, 642, 25 L. ed. 336.

⁷ See secs. 119, 138, *supra*. In view of these decisions it is not necessary for us to consider such questions as whether the clause relates to rate regulation: see Smalley, *Railroad Rate Control* (Publications of Am. Econ. Assn.) 89 et seq.; whether railroad property is "private" property within the meaning of the Amendment: see *Western U. T. Co. v. Pennsylvania R. Co.* (1904) 195 U. S. 540, 25 Sup. Ct. 133, 49 L. ed. 312; whether the imposing of regulations which under normal circumstances allow less than a stated rate of return to the carrier can be considered a "taking" within the meaning of the Constitution; and whether the fixing of the charges for carrying for members of the general public may constitute a violation of the prohibition of the taking for a "public" use: see *Noble State Bank v. Haskell* (1911) 219 U. S. 575, 580, 31 Sup. Ct. 299, 300, 55 L. ed. 341.

or so discriminatory as to be held unconstitutional.⁸ Even where the carrier did not raise the question, it is possible that the objection might be raised by shippers or passengers in one part of the state or one part of the country or by one or more classes of shippers or classes of passengers.⁹ A railroad company, however, cannot contest the validity of a regulation upon the ground that it affects unconstitutionally a patron of that company.¹⁰

Not enforcing common law.

152. By way of caution it may be added that in enforcing the provisions to which we have referred the court is simply enforcing constitutional restraints. It does not say that in spite of legislative or administrative action the rights and duties of carriers are still to be measured by the common law. It is not declaring that legislative or administrative action which departs from the common law is invalid. It could not justifiably take any such position.¹¹ And, therefore, decisions concerning the common law restraints upon common carriers are not strictly in point.

Indemnification by government so far as reductions are undue.

153. An able writer upon the subject ¹² has pointed out

⁸ See secs. 89, 118, 121, 137, *supra*. And compare *Portland Ry., L. & P. Co. v. Railroad Comn. of Oregon* (1913) 229 U. S. 397, 33 Sup. Ct. 820, 57 L. ed. 1248.

⁹ See, however, *Board of R. Comrs. v. Symms Grocer Co.* (1894) 53 Kan. 207, 35 Pac. 217; *Brooklyn U. G. Co. v. New York* (1906) 111 N. Y. App. Div. 70, 100 N. Y. Supp. 570.

¹⁰ *Interstate Com. Comn. v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946. See also note 71 in Chapter 9, *infra*.

¹¹ See sec. 33, *supra*.

¹² Smalley, *Railroad Rate Control* (Publications of Am. Econ. Assn.) p. 53, note, chap. 7.

that the railroad is not necessarily entitled to just compensation from the shippers for services rendered, but that if the government should provide for governmental indemnification of the carrier for losses if the reductions in rates should be found to be undue in so far as they were undue the statute would be constitutional regardless of the extent of the reduction of rates, and no injunction permanent or temporary restraining its enforcement could be granted upon the ground that it violated the requirement of just compensation. This position seems to be thoroughly sound,¹³ for it is not necessary for the government to make compensation for property taken in advance of the actual taking or even at the time when that property is taken.¹⁴

AMOUNT OF RETURN.

154. If a state or the federal government should attempt to limit all of the charges for transportation by a railroad which were subject to that government, the schedule of rates as an entirety might be attacked upon the ground that it did not yield to the carrier the rate of return to which it was entitled under the Constitution. In support of this contention the carrier or the creditor or stockholder of the carrier who brought the action should show the value of the property used in its business as a carrier and the net earnings.¹⁵ Those are the normal

¹³ See also *Manigault v. Springs* (1905) 199 U. S. 473, 485, 486, 26 Sup. Ct. 127, 132, 136, 50 L. ed. 274.

¹⁴ *Crozier v. Fried. Krupp Aktiengesellschaft* (1912) 224 U. S. 290, 306, 24 Sup. Ct. 488, 492, 56 L. ed. 771.

¹⁵ Of course, in arriving at the amount of the net earnings it would be necessary to show the amount of the gross earnings and the proportion of the gross earnings which might be properly expended as operating expenses.

factors in determining the validity of the schedule as an entirety although other factors not inconsistent with them may modify the conclusions to be drawn from the normal factors or may lead to entirely different conclusions. Those other possible factors vary according to the circumstances existing in each particular case.

VALUE OF PROPERTY.

Present value of property.

155. The value of the property upon which the carrier is entitled to earn a revenue is the value of the property actually used in its business at the time when the traffic is carried. This statement rests upon several recent opinions of the Supreme Court;¹⁶ and while there may be

¹⁶ In *Lincoln G. & E. L. Co. v. Lincoln* (1912) 223 U. S. 349, 358, 32 Sup. Ct. 271, 272, 56 L. ed. 466, the court said, "That the company is entitled to a fair return upon the value of the property at the time of the inquiry, is the rule." In *Willcox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 41, 52, 29 Sup. Ct. 192, 195, 200, 53 L. ed. 382, the court said, "There must be a fair return upon the reasonable value of the property at the time it is being used for the public. . . . The value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property, which legally enters into the consideration of the question of rates, has increased in value since it was acquired, the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it, where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts should be treated is not a question now before us, as this case does not present it." In *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371, the court assumed that the basis of estimate was the value of the property as it then stood: the discussion was concerning the method of ascertaining that value. See also *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 434, 454, 457, 33 Sup. Ct. 729, 754, 762, 763, 57 L. ed. 1511, including quotation in note 21, *infra*; *Stanislaus County v. San J. & K. R. C. & I. Co.* (1904) 192 U. S. 201, 213, 215, 24 Sup. Ct. 241, 246, 247, 48 L. ed. 406; *San Diego L. & T. Co. v. Jasper* (1903) 189 U. S. 439, 442, 23 Sup. Ct. 571, 572, 47 L. ed. 892; *San Diego L. & T. Co. v. National City* (1899) 174 U. S. 739, 757,

found in some earlier opinions language which does not altogether support that position,¹⁷ that basis of estimate

19 Sup. Ct. 804, 811, 43 L. ed. 1154; *Smyth v. Ames* (1898) 171 U. S. 361, 365, 18 Sup. Ct. 888, 889, 43 L. ed. 197. And see *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 412, 14 Sup. Ct. 1047, 1060, 38 L. ed. 1014. In harmony with the above cases is *Railroad Comn. of La. v. Cumberland T. & T. Co.* (1909) 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577, which decides that if a portion of the amount set aside from gross earnings to cover depreciation was not spent for renewals but for extensions and additions, the portion of the depreciation fund so spent cannot be added to the amount upon which the company is entitled to earn revenue. Presumably the money was needed for a reserve fund to pay for renewals ultimately and its use for extensions and additions merely served to maintain the total value of the company's property and not to increase the total value of that property.

¹⁷ In *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151, the court speaks of a fair return upon the "capital invested" although it affirms the decision of the state court without commenting upon the objection in its opinion that "Defendant's counsel did show what the road had cost up to June 1, 1899. . . . But not a particle of proof was presented as to the present value or cost of reproduction," or upon the syllabus prepared by the state court which says, "Courts cannot assume that the cost of reproduction of a line of railway, or that the present, as compared with the original cost of construction, is the amount of stock and bonds outstanding, or that it is what the road has cost up to time of trial:" *State ex rel. R. & W. Comn. v. Minneapolis & St. L. R. Co.* (1900) 80 Minn. 191, 83 N. W. 60. *Cotting v. Kansas C. S. Y. Co.* (1901) 183 U. S. 79, 91, 22 Sup. Ct. 30, 35, 46 L. ed. 92, involves charges by a stock yards company, but, as the court points out, the company was engaged, not in performing public services, as are carriers, water companies, etc., but merely in performing services in which the public has an interest, so that there is merely dictum in the statement, "As to parties engaged in performing a public service . . . the court . . . has declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered." See also *Smyth v. Ames* (1898) 169 U. S. 466, 546, 18 Sup. Ct. 418, 434, 42 L. ed. 819, quoted in sec. 168, *infra*, and references to *Smyth v. Ames* in *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 435, 33 Sup. Ct. 729, 755, 57 L. ed. 1511. In a case concerning turnpike rates it was said that "the amount that may have been really and necessarily invested in the enterprise" should be considered: *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 597, 17 Sup. Ct. 198, 205, 41 L. ed. 560. In *Dow v. Beidelman* (1888) 125 U. S. 680, 690, 8 Sup. Ct. 1028, 1030, 1031, 31 L. ed. 841, purchasers under fore-

would unquestionably be used by the Supreme Court at the present day,¹⁸ and it is the only conclusion which rests upon sound reason.¹⁹

Cost and capitalization not to be considered.

156. As the court said in *Smyth v. Ames*,²⁰ "the reasonableness of a schedule of rates must be determined by the facts as they exist when it is sought to put such rates into operation." And this is true concerning the value of the property. If the government appropriated that property the extent of its duty would be to pay for the value which the property possessed at the time of the appropriation; and in deciding whether a rate regulation is an

closure relied upon the original cost of the road and the amount of bonds outstanding, but the court said, "It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equaled the original cost of the road, or the amount of outstanding bonded debt, without any proof of the sum invested by the reorganized corporation or its trustees. The court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable."

¹⁸ Expressions of the lower courts to the same effect may be found—for example in the opinions in *Western U. T. Co. v. State* (1912) 31 Okla. 415, 419, 121 Pac. 1069, 1071; *Pioneer T. & T. Co. v. Westenhaver* (1911) 29 Okla. 429, 433, 118 Pac. 354, 355, 38 L. R. A. N. S. 1209; *Cumberland T. & T. Co. v. Louisville* (1911) 187 Fed. 637, 642; *Cedar Rapids G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 432, 120 N. W. 966, 968; *San J. & K. R. C. & I. Co. v. Stanislaus County* (1908) 163 Fed. 567, 575; *Consolidated Gas Co. v. New York* (1907) 157 Fed. 849, 855; *Spring V. W. v. San Francisco* (1904) 165 Fed. 657, 680, 697; *Brunswick & T. W. Dist. v. Maine W. Co.* (1904) 99 Me. 371, 380, 59 Atl. 537, 540; *Matthews v. Board of Corp. Comrs. of N. C.* (1901) 106 Fed. 7, 9; *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 373, 374, 72 N. W. 713, 715; and cases in note 31, *infra*. And see Whitten, *Valuation of Public Service Corporations*, chap. 6. Compare authorities cited in Whitten, *op. cit.*, chap. 5.

¹⁹ Other bases are discussed in Wyman, *Public Service Corporations*, p. 967 et seq.

²⁰ (1898) 171 U. S. 361, 365, 18 Sup. Ct. 888, 889, 43 L. ed. 197, modifying the decision in the same case (1898) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819.

appropriation of the railroad's property *pro tanto* the value of the property certainly ought to be estimated upon the same basis.

Of course, the present value of the property may be either less or greater than the amount of money which was actually invested in the railroad.²¹ Mistakes of con-

²¹In *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 454, 33 Sup. Ct. 729, 762, 57 L. ed. 1511, the court says, "It is clear that in ascertaining the present value we are not limited to the consideration of the amount of the actual investment. If that has been reckless or improvident, losses may be sustained which the community does not underwrite. As the company may not be protected in its actual investment, if the value of the property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than it cost. The property is held in private ownership, and it is that property, and not the original cost of it, of which the owner may not be deprived without due process of law." In *Stanislaus County v. San Joaquin & K. R. C. & I. Co.* (1904) 192 U. S. 201, 214, 24 Sup. Ct. 241, 246, 48 L. ed. 406, the court says, "The original cost may have been too great; mistakes of construction, even though honest, may have been made, which necessarily enhanced the cost; more property may have been acquired than necessary or needful for the purpose intended. Other circumstances might exist which would show the original rates much too large for fair or reasonable compensation at the present time." The court then points out that mistakes of the chief engineer had cost the company a large amount of money. In *San Diego L. & T. Co. v. National City* (1899) 174 U. S. 739, 757, 19 Sup. Ct. 804, 811, 43 L. ed. 1154, the court declares that "The property may have cost more than it ought to have cost, and its outstanding bonds for money borrowed and which went into the plant may be in excess of the real value of the property." See also *In re Advances in Rates—Eastern Case* (1911) 20 I. C. C. 243, 257, 258; *San Diego L. & T. Co. v. Jasper* (1903) 189 U. S. 439, 442, 23 Sup. Ct. 571, 572, 47 L. ed. 892; *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 412, 14 Sup. Ct. 1047, 1060, 38 L. ed. 1014; *Dow v. Beidelman* (1888) 125 U. S. 680, 690, 8 Sup. Ct. 1028, 1030, 1031, 31 L. ed. 841; authorities cited in Whitten, *Valuation of Public Service Corporations*, p. 84 et seq., and in Wyman, *Public Service Corporations*, pp. 967 et seq., 991, 992, 995; *Robinson Railway Passenger Rates*, 16 Yale Rev. 341, 369; *Louisville & N. R. Co. v. Railroad Comm. of Alabama* (1912) 196 Fed. 800, 820, 822; *Shepard v. Northern P. Ry. Co.* (1911) 184 Fed. 765, 803; *Cumberland T. & T. Co. v. Louisville* (1911) 187 Fed. 637, 642, 644; *Consolidated G. Co. v. New York* (1907) 157 Fed. 849, 855, 861; *Brunswick & T. W. Dist. v. Maine W. Co.* (1904) 99 Me. 371, 378, 379, 59 Atl. 537, 540; *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 373, 374, 72 N. W. 713, 715; *Griffin v. Goldsboro W.*

struction may have been made; structures or equipment may have depreciated or become obsolete;²² or some catastrophe, even, may have destroyed millions of dollars worth of property.²³ Or, on the other hand, the funds of the company may have been spent so wisely, the cost of materials and labor may have so increased, or the territory through which the railroad runs may have been so developed, that the resources of the company are worth far more than the amount of the actual investment.²⁴

And what is true concerning investment is still more true concerning capitalization.²⁵ Stock may have been watered; hopes may have been capitalized; money may have been spent extravagantly or dishonestly.²⁶ Or, on the other hand, stock may have been issued above par; betterments may have been paid for largely out of cur-

Co. (1898) 122 N. C. 206, 211, 30 S. E. 319, 320, 41 L. R. A. 240, 242; *Capital C. G. Co. v. Des Moines* (1896) 72 Fed. 829; *Missouri P. Ry. Co. v. Smith* (1895) 60 Ark. 221, 29 S. W. 752. Compare note 30, *infra*.

²² See sec. 157, *infra*.

²³ See *Spring V. W. Co. v. San Francisco* (1908) 165 Fed. 667, 712.

²⁴ See *In re Advances in Rates—Western Case* (1911) 20 I. C. C. 307, 338; quotation from *Willecox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 52, 29 Sup. Ct. 192, 200, 53 L. ed. 382, in note 16, *supra*. Compare note 28, *infra*.

²⁵ On this paragraph in general see Wyman, *Public Service Corporations*, p. 976 et seq.; Report of Industrial Commission, vol. 19, p. 405 et seq.; *San Diego L. & T. Co. v. National City* (1899) 174 U. S. 739, 757, 19 Sup. Ct. 804, 811, 43 L. ed. 1154; *Smyth v. Ames* (1898) 169 U. S. 466, 544, 18 Sup. Ct. 418, 433, 42 L. ed. 819; *Dow v. Beidelman* (1888) 125 U. S. 680, 690, 8 Sup. Ct. 1028, 1030, 1031, 31 L. ed. 841; *Texas & P. Ry. Co. v. Railroad Comn. of La.* (1911) 192 Fed. 280, 286; *In re Rebecchi* (1906) 100 N. Y. Supp. 335, 336; *Griffin v. Goldsboro W. Co.* (1898) 122 N. C. 206, 211, 30 S. E. 319, 320, 41 L. R. A. 240, 242; Noyes, *American Railroad Rates*, 27; note 60, *infra*.

²⁶ See, e. g., *Knoxville W. Co.* (1909) 212 U. S. 1, 11, 29 Sup. Ct. 148, 151, 53 L. ed. 371; *Lincoln G. & E. L. Co. v. Lincoln* (1909) 182 Fed. 926, 929; Report of Industrial Commission, vol. 19, p. 405 et seq. And for an interesting article on overcapitalization, though it is not strictly in point, see Wickersham, *The Capital of a Corporation*, 22 Harv. L. Rev. 319.

rent revenue and not added to the capitalization; and the funds of the company may have been spent with honesty and with unusual shrewdness.²⁷ But there is certainly no injustice in saying that the present value of the property rather than either the amount of the investment or the capitalization should govern. The same rule applies in the business world at large. In all such cases the earnings are based simply upon the present ability to produce results and not upon financial history.²⁸

Producing plant equally efficient.

157. The present value of the property seems to be the cost of producing at the present time²⁹ property which is its equal in efficiency.³⁰ From the cost of reproducing

²⁷ See, e. g., *Wright v. Georgia R. & B. Co.* (1910) 216 U. S. 420, 30 Sup. Ct. 242, 54 L. ed. 544, which was not a rate case.—In the early days, while there was a great deal of stock-watering, there were also frequently large grants to the railroads by the federal, state and municipal governments.

²⁸ See also *Louisville & N. R. Co. v. Railroad Comn.* (1912) 196 Fed. 800, 821, 822; *Pioneer T. & T. Co. v. Westenhaver* (1911) 29 Okla. 429, 433, 434, 118 Pac. 354, 355, 356, 38 L. R. A. N. S. 1209; *Consolidated G. Co. v. New York* (1907) 157 Fed. 849, 855, 856; *Matthews and Thompson, Public Service Company Rates and the Fourteenth Amendment*, 15 Harv. L. Rev. 249, 264, 265; *Bailly, The Legal Basis of Rate Regulation*, 11 Col. L. Rev. 532, 534, 540, 541; *Fenwick, The Judicial Test of a Reasonable Railroad Rate*, 8 Mich. L. Rev. 445, 450, 451. *Contra, Pennsylvania R. Co. v. Philadelphia County* (1908) 220 Pa. 100, 115, 68 Atl. 676, 679, 15 L. R. A. N. S. 108, 117, which is clearly unsound and against the weight of modern authority.—With reference to contentions such as those set forth in *Whitten, Valuation of Public Service Corporations*, chap. 5, that the actual cost of the property should be considered, it may be pointed out in addition that the original value of the property is not shown by showing the number of dollars which the property must have cost originally. The dollar is not a fixed standard of value. Its purchasing power varies. And so it would be unfair to say that because a property cost a thousand dollars seventy-five years ago a thousand dollars of to-day adequately represents the amount of the investment.

²⁹ On the significance of the term "present time" see sec. 158, *infra*.

³⁰ On the question of equal efficiency see *In re Arkansas Rate Cases* (1911)

new the present plant, deduction must be made for the depreciation which has actually taken place;³¹ a further sum must, it seems, be allowed for the difference in value

187 Fed. 290, 319; *Brunswick & T. W. Dist. v. Maine W. Co.* (1904) 99 Me. 371, 387, 388, 59 Atl. 537, 543, 544; *Capital C. G. L. Co. v. Des Moines* (1896) 72 Fed. 829, 844; Whitten, *Valuation of Public Service Corporations*, secs. 54 et seq., 73, 75 et seq.; Robinson, *Railway Passenger Rates*, 16 Yale Rev. 341, 360. It does not seem necessary that the value of property immediately along the company's line of road be considered if property can be bought for less along a somewhat different route: see *Cedar R. G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 437, 438, 120 N. W. 966, 970; *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 456, 457, 33 Sup. Ct. 729, 763, 57 L. ed. 1511; and quotations in Whitten, *Valuation of Public Service Corporations*, pp. 137, 139, which fully answer Wyman, *Public Service Corporations*, p. 995. In *Spring V. W. Co. v. San Francisco* (1908) 165 Fed. 667, 698, the court declared, "If the company sees fit to use, for the mere cachement of water, lands which are much more valuable for other purposes, it is unreasonable in fixing rates to appraise such lands for more than they are worth as watershed areas." With this note compare note 21, *supra*.

³¹ In *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 457, 458, 469, 33 Sup. Ct. 729, 763, 764, 768, 57 L. ed. 1511, the failure to deduct for depreciation was one of the reasons for reversing the action of the lower court. To the same effect is *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371. On necessity of considering present value see note 16, *supra*. As showing that ascertaining the cost of reproduction less depreciation is ordinarily the only fair method of ascertaining the present value of the property, consider *Montana, W. & S. R. Co. v. Morley* (1912) 198 Fed. 991, 1004; *Western Ry. of Alabama v. Railroad Comn.* (1912) 197 Fed. 954, 959; *Louisville & N. R. Co. v. Railroad Comn.* (1912) 196 Fed. 800, 820, 821; *Pioneer T. & T. Co. v. Westenhaver* (1911) 29 Okla. 429, 433, 434, 441, 118 Pac. 354, 355, 356, 358, 38 L. R. A. N. S. 1209; *San Joaquin & K. R. C. & I. Co. v. Stanislaus County* (1911) 191 Fed. 875, 881; *Cumberland T. & T. Co. v. Louisville* (1911) 187 Fed. 637, 642; *Shepard v. Northern P. Ry. Co.* (1911) 184 Fed. 765, 802; *Cedar R. G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 438, 439, 440, 120 N. W. 966, 970, 971; *Consolidated G. Co. v. New York* (1907) 157 Fed. 849, 855, 856; *In re Rebecchi* (1906) 100 N. Y. Supp. 335; *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 373, 374, 72 N. W. 713, 715; *Bailly, The Legal Basis of Rate Regulation*, 11 Col. L. Rev. 532, 545, 549. Compare *Cedar R. G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 437, 438, 120 N. W. 966, 970.—The entire question of depreciation is discussed at length in Whitten, *Valuation of Public Service Corporations*, chaps. 17-19; compare *ibid.*, chap. 16.

between the existing plant and a plant of modern design;³² property which is not needed for the business of the company must not be included in the basis upon which a revenue from transportation must be allowed;³³ and where the plant is markedly in excess of the requirements such excess is not entitled to earn a revenue from transportation.³⁴

³² "If the existing plant is in any respect antiquated or inefficient as compared with a new plant of modern design and of the same capacity, and shows a greater expense per unit of output or work done, then the cost of procuring such modern plant will fix the maximum sum which a prospective purchaser of the existing plant, though willing to buy, could afford to pay. The company's plant may be worth much or little, but cannot well in any event be worth more than the cost to procure a new plant of equal capacity and modern design:" Matthews and Thompson, *Public Service Company Rates and the Fourteenth Amendment*, 15 *Harv. L. Rev.* 249, 267. See also *Brunswick & T. W. Dist. v. Maine W. Co.* (1904) 99 *Me.* 371, 386-388, 59 *Atl.* 537, 543, 544. Compare *Bailly, The Legal Basis of Rate Regulation*, 11 *Col. L. Rev.* 532, 548; *Wyman, Public Service Corporations*, pp. 972, 973.

³³ "It is not just to compel consumers to pay for more than they receive, or to pay complainant an income on property which is not actually being used in gathering and furnishing water. If in this case the company, in anticipation of the growth of the city and its future needs, acquired property for future use at a cost of hundreds of thousands of dollars which is now worth millions, it has acted wisely, but it should be satisfied with the goodness of its bargain and the enhanced value of its property, without asking in addition gratuities from its customers in the way of higher rates. When the property does come into necessary service the company is entitled to have it credited at its then fair and reasonable value for rate-fixing purposes:" *Spring V. W. Co. v. San Francisco* (1908) 165 *Fed.* 667, 697. See also *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 *U. S.* 352, 440, 33 *Sup. Ct.* 729, 757, 57 *L. ed.* 1511; *Cedar R. G. L. Co. v. Cedar Rapids* (1909) 144 *Iowa*, 426, 437, 120 *N. W.* 966, 970; notes 34, 80, 81, *infra*.

³⁴ "If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two thirds of the contemplated number should pay a full return. . . . It hardly can have meant that a system constructed for six thousand acres should have a full return upon its value from five hundred, if those were all that it supplied:" *San Diego L. & T. Co. v. Jasper* (1903) 189 *U. S.* 439, 446, 447, 23 *Sup. Ct.* 571, 574, 47 *L. ed.* 892. "The rates must be reasonable to the company, but they must, in any event, be reasonable

Significance of term "present time."

158. The term "present time" has not a precise meaning. Prices fluctuate and therefore it would not do to say that the cost at the present time necessarily means the cost on a particular day. Prices at the institution of the suit or when testimony is given may be different from prices at the time when the question is decided by the court of last resort. The court should remember this when it passes upon the constitutionality of rate regulations, especially when it passes upon such questions several years after the testimony has been submitted.³⁵ Present

to the public. If a railroad is built into a new, sparsely settled territory with a view of serving a large future population and developing business, the Constitution does not require the few people and the small business of the present time to pay rates which will yield an income equal to the full return to be gathered when the country is populated and business developed to the full capacity of the road:" *Southern P. Co. v. Bartine* (1909) 170 Fed. 725, 767. "Suppose that a five hundred horse power engine was used for pumping when a one hundred horse power engine would do as well. As property to be fairly valued the larger engine might be more valuable than the smaller one, yet it could not be said that it would be reasonable to compel the public to pay rates based upon the value of the unnecessarily expensive engine:" *Brunswick & T. W. Dist. v. Maine W. Co.* (1904) 99 Me. 371, 376, 59 Atl. 537, 539. See also *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 381, 396, 72 N. W. 713, 718, 724; *Consolidated G. Co. v. New York* (1907) 157 Fed. 849; *Boise City I. & L. Co. v. Clark* (1904) 131 Fed. 415, 422; *Capital City G. L. Co. v. Des Moines* (1896) 72 Fed. 829, 844; *Long Branch Comm. v. Tintern M. W. Co.* (1905) 70 N. J. Eq. 71, 80, 85, 88, 62 Atl. 474, 477, 479, 480; *In re Arkansas Railroad Rates* (1909) 168 Fed. 720; *San Diego L. & T. Co. v. National City* (1899) 174 U. S. 739, 757, 758, 19 Sup. Ct. 804, 811, 43 L. ed. 1154; *Whitten, Valuation of Public Service Corporations*, pp. 43, 52, 56, 72, chap. 10; *Wyman, Public Service Corporations*, pp. 970-974; sec. 167, *infra*.—It must be remembered, however, that a railroad is often required by law to do some business which is unprofitable.

³⁵ Consider *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 16, 29 Sup. Ct. 148, 153, 53 L. ed. 371, where the case was pending over seven years; *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 377-380, 33 Sup. Ct. 729, 732, 57 L. ed. 1511, pending over six years; *Louisville & N. R. Co. v. Railroad Comm.* (1912) 196 Fed. 800, pending five years; *Smalley, Railroad Rate Control* (Publications of the American Eco-

cost, then, is simply an approximate sum, and its approximation to a precise sum depends upon the extent of fluctuations in prices.

Average prices would be unsatisfactory where there had been recent but very marked changes in prices which appeared likely to last for some time, as where they were caused by new inventions or by radical changes in the tariff;³⁶ and, on the other hand, if a railroad may be required to do some of its business at considerably less profit than it could be required to do its business as a whole, it seems that on like principle the court should not pay attention to fluctuations in prices of materials or operating expenses unless those changes are of importance because of the number or importance of the items or because of their immediate effect or because of the time over which they extend, although changes which are more marked may affect the constitutionality of the rates.³⁷ The grades and curves of the railroad's tracks follow in a general way the lines of the country through which the railroad passes, but they certainly do not follow those lines in every detail; and so also while the value which is used as a basis of estimate should be affected by marked economic changes it should not reflect every fluctuation in prices.

Tangible property.

159. The property of the company, of course, includes

nomic Assn.) 114-117; Hadley, *The Eleventh Amendment*, 66 Cent. L. J. 71, 76; *Smyth v. Ames* (1898) 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 197; end of note 44 in Chapter 5, *supra*.

³⁶ See, however, *Cedar R. G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 436, 437, 120 N. W. 966, 970; Whitten, *Valuation of Public Service Corporations*, p. 202 et seq., for discussions on "average price versus present price."

³⁷ See note 124, *infra*.

its land, structures, rolling stock and working capital.³⁸ And the cost of that property should be held to include the expenditures necessary to secure it, such as the cost of acquiring land,³⁹ surveying, material, labor, engineering, superintendence, bookkeeping, legal expenses,⁴⁰ the securing of funds,⁴¹ interest,⁴² insurance, taxes and any other incidental expenditures which it is necessary to make during the construction and equipment of the road for its construction and equipment.⁴³

In the Minnesota Rate Cases⁴⁴ the court refuses to con-

³⁸ *Cumberland T. & T. Co. v. Louisville* (1911) 187 Fed. 637, 646, 647; *Pioneer T. & T. Co. v. Westenhaver* (1911) 29 Okla. 429, 439, 440, 441, 118 Pac. 354, 357, 358, 38 L. R. A. N. S. 1209; *Lincoln G. & E. L. Co. v. Lincoln* (1909) 182 Fed. 926, 928; *Consolidated G. Co. v. New York* (1907) 157 Fed. 849, 859; Whitten, *Valuation of Public Service Corporations*, chap. 14.

³⁹ This includes the expense of abstracts, recording deeds, etc.: Whitten, *Valuation of Public Service Corporations*, p. 128.

⁴⁰ Compare *Cedar R. G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 438, 120 N. W. 966, 970.

⁴¹ See Whitten, *Valuation of Public Service Corporations*, chap. 13. Compare *Cedar R. G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 438, 120 N. W. 966, 970; Bailly, *The Legal Basis of Rate Regulation*, 11 Col. L. Rev. 532, 640, note.—This should include pay for services rendered in the sale of bonds but not ordinary discount on those bonds.

⁴² *Pioneer T. & T. Co. v. Westenhaver* (1911) 29 Okla. 429, 438, 118 Pac. 354, 357, 38 L. R. A. N. S. 1209; *Brunswick & T. W. Dist. v. Maine W. Co.* (1904) 99 Me. 371, 383, 59 Atl. 537, 542.

⁴³ In *Minnesota Rate Cases*—*Simpson v. Shepard* (1913) 230 U. S. 352, 451, 455, 33 Sup. Ct. 729, 761, 763, 57 L. ed. 1511, the objection of the court may be to the way in which such amounts were estimated and included in those cases.—On the subject of this section see also Whitten, *Valuation of Public Service Corporations*, chaps. 12, 16; Matthews and Thompson, *Public Service Company Rates and the Fourteenth Amendment*, 15 Harv. L. Rev. 249, 267; Bailly, *The Legal Basis of Rate Regulation*, 11 Col. L. Rev. 532, 550-552, 640; Fenwick, *The Test of a Reasonable Rate*, 8 Mich. L. Rev. 445, 453; Wyman, *Public Service Corporations*, pp. 969, 970; Esch, *Physical Valuation of Railroad Property*, 13 The Brief, 42, 54.

⁴⁴ *Minnesota Rate Cases*—*Simpson v. Shepard* (1913) 230 U. S. 352, 452 et seq., 469, 33 Sup. Ct. 729, 761 et seq., 768, 57 L. ed. 1511.

sider the value of the property to the company; and this position is unquestionably correct, for such a value depends upon the earning capacity of the railroad, which, as we shall see,⁴⁵ may not properly be considered in determining the principal upon which the company is entitled to earn a revenue. In that case the court also refuses to attribute to the land a greater value than the normal market value of land in the vicinity. It does not seem necessary that the value of property immediately along the company's present line of road be considered if property can be bought for less along a somewhat different route: the question is simply the cost of producing a road equally efficient.⁴⁶ But it does seem that the company should be allowed to earn a revenue upon the amount which it would be necessary for a company purchasing in the most economical manner to pay for a roadbed in the most economical location, and if it is a fact that in condemning land a railroad is usually obliged to pay more than the market value,⁴⁷ and that fact is proved, it should be recognized by the court.⁴⁸

⁴⁵ Sec. 162, *infra*.

⁴⁶ See note 30, *supra*.

⁴⁷ Whitten, *Valuation of Public Service Corporations*, p. 126, declares that "Usually in the general state railroad appraisals the value of land taken for right of way has not been limited by the market value of adjacent land. An allowance has been made for the higher price that the railroad would have to pay on account of damages to land not taken and on account of the fact that in condemning land for railway purposes the railway company is usually required to pay an amount in excess of market value."

⁴⁸ Compare *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 33 Sup. Ct. 729, 761, 57 L. ed. 1511. The court would hardly assume as a matter of law that a railroad can be run without any losses on account of negligence of its employees and refuse to recognize a limited amount of expenditures for such purposes as legitimate operating expenditures.

Cost of corporation itself.

160. Moreover, as large enterprises must as a general rule be conducted by corporations and not by individuals, it seems clear that the corporation must be allowed to earn a revenue upon the money which must be spent in order that it may come into life, upon the amount which must be paid to the state for the right to organize and upon the amount which must be paid to promoters, so far as the expenditures for that purpose are reasonable.⁴⁹

Cost of business of corporation.

161. Something must also be allowed for the fact that the company is a going concern.⁵⁰ Even the most efficient

⁴⁹ See Whitten, *Valuation of Public Service Corporations*, pp. 261 et seq., 643; Esch, *Physical Valuation of Railroad Property*, 13 *The Brief*, 42, 54, 59. Compare *Cumberland T. & T. Co. v. Louisville* (1911) 187 Fed. 637, 646, 647; *Cedar Rapids G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 438, 120 N. W. 966, 970.

⁵⁰ *Pioneer T. & T. Co. v. Westenhaver* (1911) 29 Okla. 429, 433 et seq., 118 Pac. 354, 359 et seq., 38 L. R. A. N. S. 1209, and authorities there cited; *Bailly, The Legal Basis of Rate Regulation*, 11 Col. L. Rev. at 640, and authorities there cited; *Missouri, K. & T. Ry. Co. v. Love* (1910) 177 Fed. 493, 496, 497; *C. H. Venner Co. v. Urbana Waterworks* (1909) 174 Fed. 348, 352; *Spring V. W. Co. v. San Francisco* (1908) 165 Fed. 667, 693. Consider also Whitten, *Valuation of Public Service Corporations*, chap. 22, especially p. 495 et seq. Compare *Montana, W. & S. R. Co. v. Morley* (1912) 198 Fed. 991, 1005; and cases in note 52, *infra*. In *Omaha v. Omaha W. Co.* (1910) 218 U. S. 180, 202, 203, 30 Sup. Ct. 615, 620, 54 L. ed. 991, which, the court carefully pointed out, simply concerned the ascertainment of value under a contract of sale and was not a rate case, the court said, "The option to purchase excluded any value on account of unexpired franchise; but it did not limit the value to the bare bones of the plant, its physical properties, such as its lands, its machinery, its water pipes or settling reservoirs, nor to what it would take to reproduce each of its physical features. The value, in equity and justice, must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers. That kind of good will, as suggested in *Willcox v. Consolidated G.*

management cannot build up a thoroughly efficient organization without an expenditure in building it up which cannot be treated entirely as current operating expenditure. Nor can it develop a profitable clientage without similar expenditure.⁵¹ It is true that part, perhaps most, of its clientage may be the result of its having a partial or complete monopoly of the business, and to that extent the possession of a clientage may be disregarded by the government when it regulates rates.⁵² But, on the other

Co. (1909) 212 U. S. 19, 20 Sup. Ct. 192, 53 L. ed. 382, is of little or no commercial value when the business is, as here, a natural monopoly, with which the consumer must deal, whether he will or no. That there is a difference between even the cost of duplication, less depreciation, of the elements making up the water company plant, and the commercial value of the business as a going concern, is evident. Such an allowance was upheld in *National W. Co. v. Kansas City* (1894) 62 Fed. 853, 27 L. R. A. 827, where the opinion was by Mr. Justice Brewer. We can add nothing to the reasoning of the learned justice, and shall not try to. That case has been approved and followed. . . . No such question was considered in either *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371, or in *Willcox v. Consolidated G. Co.* (1909) 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382. Both cases were rate cases, and did not concern the ascertainment of value under contracts of sale."

⁵¹ *Pioneer T. & T. Co. v. Westenhaver* (1911) 29 Okla. 429, 446, 118 Pac. 354, 360, 38 L. R. A. N. S. 1209; *Des Moines W. Co. v. Des Moines* (1911) 192 Fed. 193, 198; *Missouri, K. & T. Ry. Co. v. Love* (1910) 177 Fed. 493, 496, 497; *National W. Co. v. Kansas City* (1894) 62 Fed. 853, 865, 27 L. R. A. 827, 837; *Miller, Some Questions in Connection with State Rate Regulation*, 8 Mich. L. Rev. 108, 116.

⁵² *Willcox v. Consolidated G. Co.* (1909) 212 U. S. 19, 48, 52, 29 Sup. Ct. 192, 198, 200, 53 L. ed. 382; *Cedar R. G. L. Co. v. Cedar Rapids* (1912) 223 U. S. 655, 669, 32 Sup. Ct. 389, 390, 56 L. ed. 594; *Cedar R. G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 434, 120 N. W. 966, 969; *Home T. Co. v. Carthage* (1911) 235 Mo. 644, 664, 139 S. W. 547, 551; *Bristol v. Bristol & W. Waterworks* (1901) 23 R. I. 274, 278, 49 Atl. 974, 975; *National W. Co. v. Kansas City* (1894) 62 Fed. 853, 865, 27 L. R. A. 827; *Whitten, Valuation of Public Service Corporations*, sec. 699; *Bailly, The Legal Basis of Rate Regulation*, 11 Col. L. Rev. 532, 644; *Matthews and Thompson, Public Service Company Rates and the Fourteenth Amendment*, 15 Harv. L. Rev. 249, 267, 268; *Wyman, Public Service Corporations*, p. 989. See also 22 Harv. L. Rev. at 263; *Gloucester W. S. Co. v. Gloucester* (1901) 179 Mass. 365, 60 N. E. 977. Compare *Monongahela N. Co. v. United*

hand, it may be necessary to spend a considerable amount of money in order to secure a well-developed organization or a well-developed clientage and, therefore, a public service corporation must be entitled to earn a revenue upon the amount which a well-managed plant starting at the present time in the place of the present corporation would have to pay in order to build up such an organization and such a business as that which the present corporation possesses.⁵³

Capitalization of earning capacity.

162. It seems clear, however, that the valuation of the property cannot properly be based even in part upon a capitalization of the earning capacity of the company. Such a capitalization may unquestionably be used by the state if it so desires as a basis for taxation.⁵⁴ But it does

States (1893) 148 U. S. 312, 13 Sup. Ct. 622, 37 L. ed. 463; *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 410, 14 Sup. Ct. 1047, 1059, 38 L. ed. 1014, in the light of *Whitten*, op. cit., sec. 11. The decision in *Louisville & N. R. Co. v. Railroad Comn. of Alabama* (1912) 196 Fed. 800, 822, is clearly wrong.

⁵³ See discussion in *Whitten*, *Valuation of Public Service Corporations*, chap. 24. The position taken in the text is slightly different from that taken in *Bailly*, *The Legal Basis of Rate Regulation*, 11 Col. L. Rev. at 642-644, where it is said that a public service corporation is entitled to earn a revenue upon the amount which a well-managed business starting at the present time would have to pay in order to build up a business sufficient to make it reasonably profitable. See authorities there cited. Compare *Montana, W. & S. R. Co. v. Morley* (1912) 198 Fed. 991, 1005, and also the childish remarks in *Spring V. W. v. San Francisco* (1908) 165 Fed. 667, 697.

⁵⁴ *People v. New York State Board* (1905) 199 U. S. 1, 25 Sup. Ct. 705, 50 L. ed. 65. See also *San Francisco N. Bk. v. Dodge* (1905) 197 U. S. 70, 25 Sup. Ct. 348, 49 L. ed. 669; *Atchison, T. & S. F. Ry. Co. v. Sullivan* (1909) 173 Fed. 456; *Missouri, K. & T. Ry. Co. v. Shannon* (1907) 100 Tex. 379, 100 S. W. 138, 10 L. R. A. N. S. 681; *Bailly*, *The Legal Basis of Rate Regulation*, 11 Col. L. Rev. 532, 644.

not follow that it must be considered in determining the constitutionality of a state's regulation of charges.⁵⁵

The earning capacity of a public service corporation in the presence of rate regulation may be different from its earning capacity in the absence of regulation. This is elementary. The question is as to the amount of earning capacity which must be left to the corporation. It would be inconsistent to measure that amount by the amount which the corporation might earn in the absence of regulation. And it would be absurd to attempt to measure that amount by itself.⁵⁶

⁵⁵ In addition to the discussion in this section see *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 451 et seq., 33 Sup. Ct. 729, 761, et seq., 57 L. ed. 1511, referred to in sec. 159, *supra*, and discussion and citation of authorities in Whitten, *Valuation of Public Service Corporations*, chaps. 1, 3, sec. 721.

⁵⁶ "Earning capacity cannot determine the value of the property of a railroad upon which its rates must make a fair return. Earnings are dependent upon rates, and value indicated in earnings manifestly has no relation to the reasonableness of rates. Otherwise, the more the railroad charged and thereby earned, the more it would have the right to charge:" Noyes, *American Railroad Rates*, 28. "Earning capacity cannot logically be a measure of the present value of the plant of either a regulated or an unregulated public utility. The result sought for is the basis of earning capacity. If, then, earning capacity is taken as the measure of its own basis, the calculator is following the circumference of a circle, and is in a fair way of solving the problem of perpetual motion:" Bailly, *The Legal Basis of Rate Regulation*, 11 Col. L. Rev. 532, 544. "It may be asserted with confidence that any method of valuation based upon capitalization of earnings for any period, or upon the selling value of the capital stock (whether the property is overcapitalized or undercapitalized), is wholly inadmissible:" Matthews and Thompson, *Public Service Company Rates and the Fourteenth Amendment*, 15 Harv. L. Rev. 249, 268. "The impossibility of basing reasonable rates on a market value that is itself determined by reasonable rates is apparent. It is a clear case of reasoning in a circle. We have the evident absurdity of requiring the answer to the problem before we can undertake its solution. The advocates of the market value theory cannot really mean what they say. Market value is not really a part of the process but the final result. It includes in many cases a capitalization of certain monopoly profits and the monopoly value thus created is set up as justifying the higher rates which have in fact created the

Moreover, if a capitalization of the earning capacity were allowed in fixing the valuation of the property in rate cases, the railroad having the largest volume of traffic would be for that very reason allowed to charge the highest rates per unit of transportation.

Stock and bonds.

163. As we have already seen, the par value of the total amount of stock and bonds issued does not show the present value of the property of the company.⁵⁷ And the market value of the stock and bonds depends so largely upon the earnings of the company that, obviously, as the earning capacity of the property cannot be used as a test of its value in rate cases,⁵⁸ the market value of the stock and bonds does not furnish any satisfactory test of the value of the property.⁵⁹

The further fact that companies often issue stock and bonds in order to buy the stock and bonds of other railroads, also renders the capitalization of the road under investigation unreliable as a test of the amount upon which

monopoly value:" Whitten, *Valuation of Public Service Corporations*, pp. 54, 55. See also Martin, *Recent Federal Court Decisions Affecting State Laws Regulating Freight and Passenger Rates*, 21 *Yale L. J.* 117, 124; *Kennebec W. Dist. v. Waterville* (1902) 97 *Me.* 185, 202, 54 *Atl. 6*, 20-21, 60 *L. R. A.* 856; Beale and Wyman, *Railroad Rate Regulation*, p. 354; note 52, *supra*. Compare *In re Arkansas Rate Cases* (1911) 187 *Fed.* 290, 319; *Missouri, K. & T. Ry. Co. v. Love* (1910) 177 *Fed.* 493, 496; *Matthews v. Board of Corp. Comrs.* (1901) 106 *Fed.* 7, 9.

⁵⁷ See sec. 156, *supra*.

⁵⁸ See sec. 162, *supra*.

⁵⁹ See also *Montana, W. & S. R. Co. v. Morley* (1912) 198 *Fed.* 991, 1007; *Matthews and Thompson, Public Service Company Rates and the Fourteenth Amendment*, 15 *Harv. L. Rev.* 249, 268; Beale and Wyman, *Railroad Rate Regulation*, pp. 353, 354; Bailly, *The Legal Basis of Rate Regulation*, 11 *Col. L. Rev.* 532, 542, note 34. Compare *In re Arkansas Rate Cases* (1911) 187 *Fed.* 290, 318, 319.

that road should receive a revenue from transportation.⁶⁰

Value as system.

164. We have already seen that while the earning capacity of the road may be capitalized for the purpose of taxation it may not be capitalized to furnish a basis for judging the constitutionality of rate regulations.⁶¹ So also, while in tax cases the courts may recognize the fact that the separate parts of the property of the company have as parts of a larger system a greater value than they would possess if considered separately,⁶² that increased value cannot be considered as such in rate cases.⁶³ So far as the increase in value rests upon greater earning capacity it is an unsafe guide;⁶⁴ and so far as it is due to expenditures made not for tangible property but in order to build up the corporation and its organization and its clientage, that value may be more appropriately considered under other heads.⁶⁵ In short, for the purposes of rate regulation, the present value which is to be used as a

⁶⁰ See *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 440, 33 Sup. Ct. 729, 757, 57 L. ed. 1511; *Shepard v. Northern P. Ry. Co.* (1911) 184 Fed. 765, 802; *Consolidated G. Co. v. New York* (1907) 157 Fed. 849, 861.

⁶¹ See sec. 162, *supra*.

⁶² *Cleveland, C., C. & St. L. Ry. Co. v. Backus* (1894) 154 U. S. 439, 444, 14 Sup. Ct. 1122, 1123, 38 L. ed. 1041; *Chicago, B. & Q. Ry. Co. v. Babcock* (1907) 204 U. S. 585, 598, 27 Sup. Ct. 326, 329, 51 L. ed. 636; *Western U. T. Co. v. Missouri* (1903) 190 U. S. 412, 23 Sup. Ct. 730, 47 L. ed. 1116; *State v. Savage* (1902) 65 Neb. 714, 754, 755, 91 N. W. 716, 724. See also *Patterson, The United States and the States Under the Constitution*, 2d ed., p. 40, note. Compare *Fargo v. Hart* (1904) 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761; 26 Harv. L. Rev. 1, 20.

⁶³ *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 450, 451, 33 Sup. Ct. 729, 761, 57 L. ed. 1511. Compare *Missouri, K. & T. Ry. Co. v. Love* (1910) 177 Fed. 493, 496.

⁶⁴ See sec. 162, *supra*.

⁶⁵ See secs. 160, 161, *supra*.

basis is simply the cost of producing at the present time property, organization and clientage of equal value.

But, on the other hand, on the same principle, it seems that the increased amount which must often be paid for land because it is to be used by a railroad company ought to be included in the present value of the property;⁶⁶ that the partial decreases and the partial increases in the cost of the road if it is built throughout at one time instead of by piecemeal construction must be included in the estimate;⁶⁷ and that the estimate must include expenditures which are not made at the time of the original construction of the road but which are in reality deferred construction costs, such as the cost of such repairing of embankments as is due to their settling because of newness.⁶⁸

Apportionment of value.

165. In order to ascertain the total value within a state upon which a railroad is entitled to earn a revenue we must add to the value of the tangible property within the state a share of the total intangible value of the corporation. The court has sustained state laws which taxed that proportion of the total value of the corporation which the trackage within the state bore to the total trackage.⁶⁹ But the value for taxation is not the value for rate regulation;⁷⁰ and while it is possible that apportionment according to trackage would not be held unconstitutional in rate cases, such an apportionment does not seem to furnish the

⁶⁶ See discussion in sec. 159, *supra*.

⁶⁷ *Pioneer T. & T. Co. v. Westenhaver* (1911) 29 Okla. 429, 437, 118 Pac. 354, 357, 38 L. R. A. N. S. 1209. See also Whitten, *Valuation of Public Service Corporations*, chap. 15.

⁶⁸ See Whitten, *Valuation of Public Service Corporations*, chap. 16.

⁶⁹ See cases in note 62, *supra*.

⁷⁰ See authorities in secs. 162, 164, *supra*.

fairest method of arriving at the value within the state. It seems that the fairest method would be to take all of the elements of value which can be definitely localized (which may include more than merely tangible property), find the proportion of such elements of value which are within the state to those in all states within which the company operates, and assign in similar proportion those elements of value which cannot be localized.⁷¹

Where an attack is made upon the validity of a schedule of intrastate rates as an entirety, it is necessary to recognize the fact that to a large extent the same property within the state is used in both interstate and intrastate traffic, and it is necessary to apportion the value of such property and declare what portion, plus the property which is used exclusively for local traffic, is entitled to earn a revenue from intrastate business.⁷²

The apportionment, at least in the absence of exceptional circumstances,⁷³ must be based, not upon the proportion between the gross earnings from the two classes of business,⁷⁴ as was done by some of the lower federal

⁷¹ Of course, property not used in the operation of the road, such as stock and bonds of other roads, cannot be included in the estimate: *Fargo v. Hart* (1904) 193 U. S. 490, 24 Sup. Ct. 498, 48 L. ed. 761. See also *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 440, 33 Sup. Ct. 729, 757, 57 L. ed. 1511. On terminals see *Judson, Interstate Commerce*, 2d ed., p. 196; *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 72 N. W. 713.

⁷² See sec. 12, *supra*.

⁷³ If, for example, the interstate and intrastate traffic differed in that one consisted much more largely than the other of low-grade freight, such as coal or stone, it is possible that this fact should be taken into consideration.

⁷⁴ As was said in *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 459, 461, 33 Sup. Ct. 729, 764, 765, 57 L. ed. 1511, "It is said that a division of the value of the property according to gross earnings is a division according to the 'value of the use,' and therefore proper. But it would seem to be clear that the value of the use is not shown by *gross* earnings. The gross earnings may be con-

courts,⁷⁵ but upon the extent to which the facilities of the company are used;⁷⁶ and, since the cars usually carry at

sumed by expenses, leaving little or no profit. If, for example, the intrastate rates were so far reduced as to leave no net profits, and the only profitable business was the interstate business, it certainly could not be said that the value of the use was measured by the gross revenue. . . . If the property is to be divided according to the value of the use, it is plain that the gross-earnings method is not an accurate measure of that value. . . . The value of the use, as measured by return, cannot be made the criterion when the return itself is in question. If the return, as formerly allowed, be taken as the basis, then the validity of the state's reduction would have to be tested by the very rates which the state denounced as exorbitant. And, if the return as permitted under the new rates be taken, then the state's action itself reduces the amount of value upon which the fairness of the return is to be computed." See also *Missouri Rate Cases—Knott v. Chicago, B. & Q. R. Co.* (1913) 230 U. S. 474, 504, 33 Sup. Ct. 975, 981, 982, 57 L. ed. 1571; *Allen v. St. Louis, I. M. & S. Ry. Co.* (1913) 230 U. S. 553, 557, 33 Sup. Ct. 1030, 1032, 57 L. ed. 1625; *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 175, 177, 20 Sup. Ct. 336, 339, 44 L. ed. 417; *Martin, Recent Federal Court Decisions Affecting State Laws Regulating Freight and Passenger Rates*, 21 *Yale L. J.* 117, 124; and note 56, *supra*.

⁷⁵ In some cases the apportionment was based upon the relation of the gross revenue from intrastate transportation to the gross revenue from the entire transportation within the state: *Western Ry. of Alabama v. Railroad Comm.* (1912) 197 Fed. 954, 969 (with which compare 197 Fed. at 964); *Shepard v. Northern P. Ry. Co.* (1911) 184 Fed. 765, 811, 812; *Missouri, K. & T. Ry. Co. v. Love* (1910) 177 Fed. 493; *Ames v. Union P. Ry. Co.* (1894) 64 Fed. 165, 179; see also *Western U. T. Co. v. State* (1912) 31 *Okla.* 415, 121 *Pac.* 1069; and in other cases according to the relation between the gross revenue from the two kinds of transportation modified by the difference in the expense of conducting the two kinds of transportation: *St. Louis & S. F. R. Co. v. Hadley* (1909) 168 Fed. 317, 348-351; *Trust Co. of A. v. Chicago, P. & St. L. Ry. Co.* (1912) 199 Fed. 593, 604; *Louisville & N. R. Co. v. Railroad Comm. of Alabama* (1912) 196 Fed. 800, 824; *In re Arkansas R. Rates* (1908) 163 Fed. 141, 142; and see *Western Ry. of Alabama v. Railroad Comm.* (1912) 197 Fed. 954, 964 (with which compare 197 Fed. at 969); *In re Arkansas Rate Cases* (1911) 187 Fed. 290, 318. But, as already pointed out, both bases of apportionment are manifestly unsound. Differences in operating expenses should be considered in determining the net earnings but they have no bearing upon the valuation of the plant. And as the gross revenue depends upon the rates, it is clearly absurd to use the gross revenue as a basis for determining the value upon which rates must be allowed to earn a revenue.

⁷⁶ As was said in *Minnesota Rate Cases—Simpson v. Shepard* (1913)

the same time both interstate and intrastate freight or both interstate and intrastate passengers, it seems that the apportionment should be based not upon car mileage but upon ton mileage and passenger mileage.⁷⁷

Having found the total value within the state upon which the company is entitled to earn a revenue from both interstate and intrastate traffic, this total value may be apportioned between freight and passenger traffic by finding the extent to which the facilities can be said to be used exclusively for freight traffic and the extent to which they can be said to be used exclusively for passenger traffic and then assigning the residuum of value in the same proportion.

Having found the value upon which the company is entitled to earn a revenue from both interstate and intrastate freight traffic within the limits of the state, that value can be apportioned between interstate and intrastate traffic according to the extent to which the facilities are used in each of those two classes of traffic, as shown

230 U. S. 352, 461, 33 Sup. Ct. 729, 765, 57 L. ed. 1511, "When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue, and this must be found in the use that is made of the property. That is, there should be assigned to each business that proportion of the total value of the property which will correspond to the extent of its employment in that business. It is said that this is extremely difficult; in particular, because of the necessity for making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments respectively, the property exclusively used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common. It is suggested that other methods of calculation would be equally favorable to the state rates, but this we cannot assume."

⁷⁷ See cases in note 49 in Chapter I, *supra*. Compare *Missouri, K. & T. Ry. Co. v. Love* (1910) 177 Fed. 493, 497, where the court thoroughly misunderstands the questions of value and apportionment of value.

by the ton mileage. So also we can find the value assignable to intrastate passenger traffic when we have found the relation of the intrastate passenger mileage to the total passenger mileage within the state. By adding the result found as to intrastate freight traffic to the result found as to intrastate passenger traffic we will have the total value within the state upon which the railroad should be entitled to earn a revenue upon intrastate traffic of all kinds.

We have thus what appears to be a correct method of finding the value upon which a railroad should be entitled to earn a revenue from intrastate traffic. And to support this method it is not necessary to show that the railroad which is allowed to earn a sufficient revenue upon its intrastate traffic as a whole must be allowed to earn a profit upon both the intrastate freight traffic and the intrastate passenger traffic separately.

Particular classes of traffic.

166. If an attempt is made to segregate a particular class of intrastate traffic, it seems clear that the value of the property used is the value of the property which is used exclusively for that transportation plus a share of the value of the property used for it in common with other traffic, and that that share must be based upon the proportion which the use of the common facilities for that purpose bears to the use of those common facilities for all purposes.

It is not always possible to show the proportion of the total value of the property upon which a particular traffic is entitled to earn a revenue.⁷⁸ Between interstate and

⁷⁸ See *Northern P. Ry. Co. v. North Dakota* (1910) 216 U. S. 579, 581, 30 Sup. Ct. 423, 424, 54 L. ed. 624; *Atlantic C. L. R. Co. v. Florida* (1906)

intrastate traffic only an approximate division of value can be made, but results which are sufficiently accurate for practical purposes can be reached. We can separate intrastate freight business as a whole from intrastate passenger business as a whole. The result will be only an approximate part of the entire value of the property within the state. Yet we can reach a result containing a degree of accuracy sufficient for practical purposes unless the schedule is very near the dividing line between constitutionality and unconstitutionality. So also it may be possible likewise to segregate an important division of the railroad or under some circumstances an important class of the traffic. But we must realize that the more we subdivide subdivisions of the business, or the more minute those subdivisions are, the less and less reliable will be the results until for practical purposes they are useless.⁷⁹

Moreover, a railroad is not entitled to earn the same rate of return upon all classes of business, and for this reason if for no other it is not usually important for us to know what proportion of the value of the road may be said to be devoted to that portion of the total transportation.

Unprofitable parts of the property.

167. The state or federal government may also establish rates upon portions of the railroad and exclude from the reckoning other portions of the road which are conspicu-

203 U. S. 256, 260, 27 Sup. Ct. 108, 109, 51 L. ed. 174; *Northern P. Ry. Co. v. Lee* (1912) 199 Fed. 621, 632, and cases there cited; *Southern P. Co. v. Campbell* (1911) 189 Fed. 182, 186. Compare note 99, *infra*.

⁷⁹ See *Northern P. Ry. Co. v. Lee* (1912) 199 Fed. 621, 632; Smalley, *Railroad Rate Control* (Publications of American Economic Assn.) 6, 7; Noyes, *American Railroad Rates*, 28; Reynolds, *Railway Valuation—Is It a Panacea?* 8 Col. L. Rev. 265, 270; *Leechburg Borough v. Leechburg W. W. Co.* (1908) 219 Pa. 263, 68 Atl. 669.

ously less profitable, such as extensions⁸⁰ or, probably, terminals, which are extremely expensive and the construction of which, in view of the probably small increases in revenue which they will produce, was unwarranted.⁸¹

⁸⁰ Florida E. C. Ry. Co. v. United States (1912) 200 Fed. 797.

⁸¹ See cases in note 34, *supra*. In *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 383, 384, 72 N. W. 713, 719, the court said, "In this case the cost of reproducing the terminals is, as we have seen, one-third of the cost of reproducing the whole railroad system within the state. If rates were fixed by the law or by the railway company for the terminals, and separate rates for the rest of the road, so that the public would have a right to use the rest of the road without using the terminals, and these rates were fixed on the basis of requiring the terminals to produce one-third of the net earnings within this state, grass would soon be growing on the terminals. The public would soon find ways by which to avoid incurring the enormous expense of using the terminals. Rather than pay three, four or five dollars for riding on the terminals, the passenger coming to St. Paul or Minneapolis would leave the train beyond the terminals, and ride to his destination on a street car for five or ten cents. Rather than incur an expense of eight, ten or twelve dollars for hauling a car of freight over the terminals, the shipper could afford to unload the car beyond the terminals, and haul the freight to its destination on wagons and drays. But he would not have to do this very long. Some one would soon construct a belt line or a system of switches to connect him with other railroad tracks and other terminals, over which his car would be hauled to its destination for the ordinary switching charges of from two to five dollars per car. If these excessive charges for the use of terminals could not be thus avoided, they would constitute a prohibitory tariff, which would prevent a large amount of public traffic from entering or passing through these cities.

. . . A number of the companies owning the railroads radiating west, northwest, and southwest from Chicago claim that the cost of reproducing their Chicago terminals would be as great as the cost of reproducing all the rest of their systems of roads. If they were required by law to make a separate charge to each patron for the use of these terminals, and another separate charge for the use of the rest of the road, so that he might avoid using the terminals if he could, and they attempted on this basis to make the terminals produce one-half the net earnings of the whole system, how absurd would be the result. . . . It is clear that where real estate outside of the business center, and in the outlying districts, of a city, has been given a large speculative or prospective value, it cannot, whether used for railroad terminals or other purposes, be made, ordinarily, to produce a reasonable annual income on the investment, and the profits which are expected from such investments are not annual, but accumulated, profits, to be realized by future increase in value." See also 69 Minn. at 396, 72 N. W. at 724.

Smyth v. Ames criticized.

168. In conclusion we must refer to a passage in the opinion of the court in *Smyth v. Ames*.⁸² It must be considered because it has been quoted with approval in a number of cases, more especially in cases in the lower courts,⁸³ although in view of the present condition of the law this portion of the opinion is misleading rather than helpful.⁸⁴

The court said, "The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the road under the particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered are reasonably worth." ⁸⁵

⁸² (1898) 169 U. S. 466, 546, 18 Sup. Ct. 418, 434, 42 L. ed. 819.

⁸³ But see *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 434, 435, 33 Sup. Ct. 729, 754, 755, 57 L. ed. 1511, where it is quoted with approval.

⁸⁴ Whitten, *Valuation of Public Service Corporations*, p. 39.

⁸⁵ The language of Harlan, J., in this opinion seems to echo the lan-

But the later cases show more clearly than does *Smyth v. Ames* that in finding the value of the property the essential question is as to its present value, and a consideration of the factors mentioned in *Smyth v. Ames* does not furnish a satisfactory method of finding the present value.

Even assuming that "the original cost of construction" and "the amount expended in permanent improvements" could be determined accurately, and in most cases they could not be so determined,⁸⁶ and even assuming that it were proved that every such expenditure had been made honestly and economically, the amounts so found would not necessarily be considered by the court.⁸⁷ In *Smyth v. Ames* those expenditures were not regarded as showing by themselves the present value of the property; and even if used in connection with other factors they would be more apt to mislead than to assist in reaching accurate results.

We have already seen that the amount of the capitalization and the market value of the stock and bonds should not be considered in determining the present value of the property for the purposes of rate regulation.⁸⁸

It is self-evident that if an effort is made to find the cost of reproducing the property at the present time that fact can be found more satisfactorily by a direct method than by finding the original cost of construction and im-

guage of the dissenting opinions of Harlan and Field, JJ., in *Stone v. Farmers' L. & T. Co.* (1886) 116 U. S. 307, 340, 341, 344, 6 Sup. Ct. 334, 389, 390, 1192, 29 L. ed. 636.

⁸⁶ See *In re Advances in Rates—Eastern Case* (1911) 20 I. C. C. 243, 257, 258; *Robinson, Railway Passenger Rates*, 16 Yale L. Rev. 341, 369; *Louisville & N. R. Co. v. Railroad Comn.* (1912) 196 Fed. 800, 820, 822, and other authorities cited in note 21, *supra*.

⁸⁷ See, e. g., *San Diego L. & T. Co. v. Jasper* (1903) 189 U. S. 439, 442, 23 Sup. Ct. 571, 572, 47 L. ed. 892; *Dow v. Beidelman* (1888) 125 U. S. 680, 690, 8 Sup. Ct. 1028, 1030, 1031, 31 L. ed. 841.

⁸⁸ See secs. 156, 163, *supra*.

provements and comparing those costs with present costs.⁸⁹

“The probable earning capacity of the road under the particular rates prescribed by statute, and the sum required to meet operating expenses” certainly ought to be considered in rate cases. The validity of the schedule depends upon whether the net earnings—the gross earnings minus the operating expenses—constitute an appropriate percentage of the value of the property. But the problem immediately before us is to determine the amount of the principal upon which the income is to be based. And so, while the amount of the gross earnings and operating expenses are of importance as showing the income of the road, they should not be considered by the court in these cases in determining its value.⁹⁰

We have thus noted some of the objections to the oft-quoted statement of the court in *Smyth v. Ames*. That statement certainly does not show as clear an understanding of the questions involved in rate cases as is shown in later opinions of the court.

Rough estimates of value.

169. In some cases a rough estimate of the value of the property may be sufficient.⁹¹ The road may show such a

⁸⁹ See Whitten, *Valuation of Public Service Corporations*, p. 39.

⁹⁰ See, e. g., Fenwick, *The Test of a Reasonable Railroad Rate*, 8 Mich. L. Rev. 445, 450.

⁹¹ See, for example, *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 382, 412, 413, 14 Sup. Ct. 1047, 1060, 38 L. ed. 1014, where the court held that “a general averment in a bill that a tariff as established is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily

history of wise, honest, economical and provident financial management that there will be no room for doubt that the present value of the property exceeds the amount of stock and bonds outstanding, and such a minimum valuation based on its history and the amount of its stock and bonds may be sufficient for the purposes of the company. In most cases, however, it will be necessary to consider the elements which make up the value of the property more carefully.^{91a}

Summary as to value.

170. We have seen that the value of the property which must be used as a basis from which to determine whether the rates established by the government so restrict the revenues of a railroad company as to deprive the company of its property without just compensation is the

fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than fifty per cent; that under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the operating expenses; and that such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force." And see cases immediately following *Reagan v. Farmers' L. & T. Co.* in the same volume; *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 591, 592, 17 Sup. Ct. 198, 203, 41 L. ed. 560; *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 472, 33 Sup. Ct. 729, 769, 57 L. ed. 1511; *Missouri Rate Cases—Knott v. Chicago, B. & Q. R. Co.* (1913) 230 U. S. 474, 507, 33 Sup. Ct. 975, 983, 57 L. ed. 1571. In *Louisville & N. R. Co. v. Railroad Comn. of Alabama* (1912) 196 Fed. 800, 819, the receipts from the intrastate business were not sufficient to meet all the expenses which were properly chargeable against that business. See also cases in note 141 and sec. 186, *infra*.

^{91a} See, e. g., *Missouri Rate Cases—Knott v. Chicago, B. & Q. R. Co.* (1913) 230 U. S. 474, 33 Sup. Ct. 975, 57 L. ed. 1571.

amount which it would cost to produce at the present time property of equal efficiency, deducting from the cost of such a plant new an amount to compensate for the depreciation which has taken place. To the cost of reproducing such tangible property must be added the cost of producing at the present time a corporation adapted to do the work and the cost of building up at the present time an organization and a clientage such as the present corporation possesses, allowing nothing for that part of the clientage which is the result of the possession of a partial or complete monopoly by the corporation. But, on the other hand, we have seen that the earning capacity of the corporation and the market value of the stock and bonds have no bearing upon the valuation of the property for the purposes of rate regulation.

We have also considered the use of the same equipment for more than one class of transportation—for example, for both interstate and intrastate transportation,—and have considered principles of apportionment of valuation which appear to be sound.

OPERATING EXPENSES.

General principles.

171. Having found the value of the property, the rate of return upon that property depends upon the amount of the earnings which remain after we have deducted from the gross earnings all the necessary current expenditures which do not increase the total value of the property and which are not distributions of earnings among investors. The necessary current expenses include, of course, the cost of conducting transportation,⁹² the cost of maintain-

⁹² *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 177, 178, 20 Sup. Ct. 336, 340, 44 L. ed. 417; *In re Arkansas Rate Cases* (1911)

ing the value of the property unimpaired,⁹³ and other items, such as current taxes;⁹⁴ but it goes without saying that payments which are extravagant or dishonest, whether they are for salaries⁹⁵ or for any other purpose,⁹⁶ may not properly come under this head.

Transportation.

172. The cost of conducting transportation includes not only the cost of such important items as wages and fuel but also such minor expenses as those which are nec-

187 Fed. 290, 334; *Northern P. Ry. Co. v. Keyes* (1898) 91 Fed. 47, 53; *Chicago & N. W. Ry. Co. v. Dey* (1888) 35 Fed. 866, 879, 1 L. R. A. 744, 752; *Long Branch Comm. v. Tintern M. W. Co.* (1905) 70 N. J. Eq. 71, 94, 62 Atl. 474, 482.

⁹³ *Knoxville v. Knoxville W. Co.* (1911) 212 U. S. 1, 13, 29 Sup. Ct. 148, 152, 53 L. ed. 371; *In re Arkansas Rate Cases* (1911) 187 Fed. 290, 334; *Cedar Rapids G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 444, 120 N. W. 966, 972 (overruling *Cedar Rapids W. Co. v. Cedar Rapids* (1902) 118 Iowa, 234, 263, 91 N. W. 1081, 1091); *Spring Valley W. Co. v. San Francisco* (1908) 165 Fed. 667, 703; *Long Branch Comm. v. Tintern M. W. Co.* (1905) 70 N. J. Eq. 71, 94, 62 Atl. 474, 482; *Contra Costa W. Co. v. Oakland* (1904) 165 Fed. 518, 532; *Northern P. Ry. Co. v. Keyes* (1898) 91 Fed. 47, 53; *Chicago & N. W. Ry. Co. v. Dey* (1888) 35 Fed. 866, 879, 1 L. R. A. 744, 752; and see cases cited in Wyman, *Public Service Corporations*, pp. 1034, 1037; Whitten, *Valuation of Public Service Corporations*, chap. 20. Compare *Home T. Co. v. Carthage* (1911) 235 Mo. 644, 655, 656, 139 S. W. 547, 552; *Illinois C. R. Co. v. Interstate Com. Comm.* (1907) 206 U. S. 441, 462, 27 Sup. Ct. 700, 707, 51 L. ed. 1128; *Long Branch Comm. v. Tintern M. W. Co.* (1905) 70 N. J. Eq. 71, 62 Atl. 474; Wyman, *Public Service Corporations*, p. 1036.

⁹⁴ *Cumberland T. & T. Co. v. Memphis* (1908) 183 Fed. 875, 877; *Contra Costa W. Co. v. Oakland* (1904) 165 Fed. 518, 532; *Southern Pac. Co. v. Board of R. Comrs.* (1896) 78 Fed. 236, 272.

⁹⁵ *Chicago & G. T. Ry. Co. v. Wellman* (1892) 143 U. S. 339, 345, 12 Sup. Ct. 400, 402, 30 L. ed. 176; *Brooklyn H. R. Co. v. Brooklyn C. R. Co.* (1908) 109 N. Y. Supp. 31, 35. And see *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 412, 14 Sup. Ct. 1047, 1059, 38 L. ed. 1014; *Missouri P. Ry. Co. v. Smith* (1895) 60 Ark. 221, 244, 29 S. W. 752, 755.

⁹⁶ *Pannell v. Louisville T. W. Co.* (1902) 113 Ky. 630, 68 S. W. 662; *Missouri, K. & T. R. Co. v. Interstate Com. Comm.* (1908) 164 Fed. 645, 648. See also *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 412,

essary for the securing of business.⁹⁷ And if losses caused by the negligence of employees have occurred in spite of proper management of the railroad, such losses may be included in the operating expenses.⁹⁸

The courts recognize the fact that local transportation costs more per mile than through transportation and that, while the exact difference may never be ascertainable, working estimates of that difference can be formed.⁹⁹ So also the courts have recognized the fact that where ship-

14 Sup. Ct. 1047, 1059, 1060, 38 L. ed. 1014; *Missouri P. Ry. Co. v. Smith* (1895) 60 Ark. 221, 244, 29 S. W. 752, 755. Compare *In re Arkansas R. Rates* (1909) 168 Fed. 720, 729, 730.

⁹⁷ See *In re Arkansas Rate Cases* (1911) 187 Fed. 290, 316. Compare *United States v. Delaware, L. & W. R. Co.* (1907) 152 Fed. 269; *Pannell v. Louisville T. W. Co.* (1902) 113 Ky. 630, 68 S. W. 662.

⁹⁸ *In re Arkansas Rate Cases* (1911) 187 Fed. 290, 306.

⁹⁹ *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 262, 22 Sup. Ct. 900, 902, 903, 46 L. ed. 1151; *Chicago, M. & St. P. Ry. Co. v. Pomphkins* (1900) 176 U. S. 167, 177, 178, 20 Sup. Ct. 336, 340, 44 L. ed. 417; *In re Arkansas Rate Cases* (1911) 187 Fed. 290, 334; *Shepard v. Northern P. Ry. Co.* (1911) 184 Fed. 765, 812, and cases cited on p. 815, with which compare *Minnesota Rate Cases*, *infra*. As was said in *Northern P. Ry. Co. v. Keyes* (1898) 91 Fed. 47, 53, "The operating expenses of a railroad consist of two principal items: (1) Cost of maintenance of plant; (2) cost of conducting transportation. The former item is constant, and can justly be divided between the different kinds of traffic in proportion to their volume. As to the second item, however, such a division cannot properly be made; for it is agreed, by all who have had occasion to consider the subject, railroad commissions as well as railroad officials, that the cost of conducting transportation is, relative to income, much higher for local business than for the general business of a road. The causes of this added cost are chiefly three: (1) The shortness of the haul; (2) the lightness of the train loads; (3) expense of billing and handling the traffic." Compare note 79, *supra*.—In the *Minnesota Rate Cases*—*Simpson v. Shepard* (1913) 230 U. S. 352, 465, 466, 469, 33 Sup. Ct. 729, 766, 767, 768, 57 L. ed. 1511, the court discusses the question and decides that the difference in cost of conducting the two classes of transportation was not shown with such accuracy as to warrant the court in declaring the state legislation unconstitutional. See also discussion in *Missouri Rate Cases*—*Knott v. Chicago, B. & Q. R. Co.* (1913) 230 U. S. 474, 504, 505, 507, 30 Sup. Ct. 975, 982, 983, 57 L. ed. 1571; *Allen v. St. Louis, I. M. & S. Ry. Co.* (1913) 230 U. S. 553, 558, 559, 33 Sup. Ct. 1030, 1032, 1033, 57 L. ed. 1625; *Wood v. Vandalia R. Co.* (1913) 231 U. S. 1, 32 Sup. Ct. 7, 58 L. ed.

ments are few and small they cost more per ton mile than where they are many and large.¹⁰⁰

Maintenance.

173. The cost of maintenance embraces whatever current expenditures are necessary in order to maintain the total value of the property unimpaired;¹⁰¹ but it does not embrace expenditures which increase the value of that property.¹⁰² It does not seem necessary that the money

¹⁰⁰ Northern P. Ry. Co. v. Keyes (1898) 91 Fed. 47.—On relative cost of freight and passenger traffic see Coal & C. Ry. Co. v. Conley (1910) 67 W. Va. 129, 197, 67 S. E. 613, 642; Pennsylvania R. Co. v. Philadelphia County (1908) 220 Pa. 100, 68 Atl. 676, 15 L. R. A. N. S. 108.

¹⁰¹ See cases in note 93, *supra*.

¹⁰² Coal & C. Ry. Co. v. Conley (1910) 67 W. Va. 129, 193, 67 S. E. 613, 641; Erie v. Erie G. & M. Co. (1908) 78 Kan. 348, 354, 97 Pac. 468, 470; and see Miller, Some Questions in Connection with State Rate Regulation, 8 Mich. L. Rev. 108, 110, 111. The Interstate Commerce Act (Act June 29, 1906, 34 U. S. Stat. at L. 584, 593, Fed. Stats. An., Supp., 1909, 254, 272) requires carriers subject to it to report separately the amount spent for improvements and the amount spent for operating expenses. In Illinois C. R. Co. v. Interstate Com. Comn. (1907) 206 U. S. 441, 462, 27 Sup. Ct. 700, 707, 51 L. ed. 1128, the court said, "It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year."—Where a wooden bridge is replaced by a steel one, or a steel bridge by a stone bridge, or a track of eighty pound rails by a track of hundred pound rails, should the *additional* cost be included in the ordinary maintenance expenses or should it be given a separate classification? It seems that if earnings are spent in increasing the value of the road, which increased value may be used as a basis for estimating the constitutionality of rates in the future, that fact should be stated, and while that part of the expenditures which a replacement would cost should be included in the operating expenditures, the increase in cost should be separated from ordinary expense of maintenance. See Hearings of Senate Committee on Interstate Commerce, May, 1905, vol. IV, pp. 3085, 3111. In opposition to this view may possibly be cited Metropolitan T. Co. v. Houston & T. C. R. Co. (1898) 90 Fed. 683, which decides that under the circumstances there set forth betterments can be paid for from the gross earnings, although it is doubtful whether the case decides more than

should be spent only for renewals. If, for instance, upon a new railroad a sum equivalent to the depreciation in property which does not yet require renewal were spent for betterments or extensions, such an expenditure which simply maintained the total value of the property at the original amount should, it seems, be considered legitimate expense of maintenance,¹⁰³ although in the case of an older railroad where necessary renewals called for the full amount of the depreciation fund an expenditure for betterments, even though required by the increasing demands for transportation, could not properly be considered an expense for maintenance.¹⁰⁴ So also it seems that the company must be allowed to replace from operating expenditures whatever losses are caused by obsolescence as well as those which are caused by wear and tear or decay.¹⁰⁵ Whatever maintains the total value of the property should be regarded as legitimate expense of maintenance.

this. *Southern P. Co. v. Board of R. Comrs.* (1896) 78 Fed. 236, decides that betterments may be included in the operating expenses, citing *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014, and earlier cases. In *Reagan v. Farmers' L. & T. Co.*, while the court seems to decide as stated, it barely touches upon the question, for other facts control the case, and, moreover, many of the expenditures for so-called betterments were merely for renewals. None of the other cases cited in the *Southern Pacific* case involve railroad rates, and in some of them the question of betterments does not arise in any way. In *Reagan v. Farmers' L. & T. Co.* the court carefully points out that none of the expenditures for so-called betterments were for extensions. Part of the amount so expended was very properly included in the operating expenses, although it is not clear that all of the expenditure should have been so classified.

¹⁰³ See *Hearings of Senate Committee on Interstate Commerce*, April, 1905, vol. II, p. 931; Whitten, *Valuation of Public Service Corporations*, chap. 20; and also *Railroad Comn. of La. v. Cumberland T. & T. Co.* (1909) 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577, referred to at end of note 16, *supra*.

¹⁰⁴ See Wyman, *Public Service Corporations*, sec. 1164.

¹⁰⁵ See Whitten, *Valuation of Public Service Corporations*, pp. 403 et seq., 383, where the question is discussed.

nance; whatever increases that value should be accounted for under another head.

But expenditure on account of past losses cannot be included in the cost of maintenance. If the property has been allowed to depreciate the company cannot charge against the present year expenditures on account of losses which accrued in years gone by. Past depreciation cannot be made good at the expense of present patrons.¹⁰⁶

Payments to stockholders and bondholders.

174. Payments to stockholders¹⁰⁷ and to bondholders,¹⁰⁸ however, are not part of the current expenses, but

¹⁰⁶ *Puget S. E. Ry. v. Railroad Comn.* (1911) 65 Wash. 75, 82, 117 Pac. 739, 743. See also *Southern Pac. Co. v. Board of R. Comrs.* (1896) 78 Fed. 236, 272. Compare *Hearings of Senate Committee on Interstate Commerce*, May, 1905, vol. III, p. 2149.

¹⁰⁷ *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 266, 22 Sup. Ct. 900, 904, 46 L. ed. 1151, affirming *State v. Minneapolis & St. L. R. Co.* (1900) 80 Minn. 191, 200, 83 N. W. 60, 64.

¹⁰⁸ In *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 266, 22 Sup. Ct. 900, 904, 46 L. ed. 1151, the court speaks of the propriety of including payments to bondholders as "at least doubtful." See also Miller, *Some Questions in Connection with State Rate Regulation*, 8 Mich. L. Rev. 108, 112. Compare *Chicago & N. W. Ry. Co. v. Dey* (1888) 35 Fed. 866, 879, 1 L. R. A. 744, 752; *Wallace v. Arkansas C. R. Co.* (1902) 118 Fed. 422; *Chicago, M. & St. P. Ry. Co. v. Smith* (1901) 110 Fed. 473.—A company financed only by stock subscriptions would have to be satisfied with rates based upon present conditions. The value of its property would be merely the cost of replacement. What if the road were built entirely from money received from holders of bonds, if it cost more than it would cost to replace it, and if the rate of interest named in the bonds were higher than the current rate? Should such a road be entitled to charge more for transportation than might be charged by a road built entirely by the stockholders? Such cases are not imaginary. In *Lincoln G. & E. L. Co. v. Lincoln* (1900) 182 Fed. 926, 929, the bonded indebtedness alone greatly exceeded the cost of the plant. See also 19 *Industrial Commission Reports*, 403-407; *Knoxville v. Knoxville W. Co.* (1900) 212 U. S. 1, 11, 29 Sup. Ct. 148, 151, 53 L. ed. 371. And in *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 385-389, 72 N. W. 713, 719-721, the rate of interest on the bonds was considerably higher than the rate at which money could be borrowed in 1897.

are both returns from investment. In finding the value of the railroad property the court does not treat the investment of bondholders as a separate item, like the investment of a lessor. It is, instead, part of the property of the company, part of the principal sum upon which the company is entitled to earn a revenue. For this reason, payments to bondholders cannot be regarded as operating expenses like payments to lessors, but they must be placed in the same class as payments to stockholders, as coming from the net revenue upon the entire value of the property.

NET EARNINGS.

What earnings are to be considered.

175. The return which the carrier receives from the use of its property is shown by the amount of the net earnings and not by the amount of the gross earnings.¹⁰⁹ The depreciation in the value of the property, whether from wear and tear, obsolescence or any analogous cause, should be deducted from the amount of the gross earnings in computing the net returns from the property;¹¹⁰ and upon the same principle it seems clear that appreciation in the value of the property should be added to the revenue received from its patrons.¹¹¹

In passing upon the constitutionality of regulations the returns from interstate traffic are separated from the re-

¹⁰⁹ *Chicago, M. & St. P. Ry. Co. v. Tompkins* (1900) 176 U. S. 167, 20 Sup. Ct. 336, 44 L. ed. 417. And see *Wood v. Vandalia R. Co.* (1913) 231 U. S. 1, 34 Sup. Ct. 7, 58 L. ed.; *Morgan's L. & T. R. Co. v. Railroad Comn. of La.* (1911) 127 La. 636, 53 So. 890; *Chicago, M. & St. P. Ry. Co. v. Smith* (1901) 110 Fed. 473; and sec. 171, *supra*.

¹¹⁰ See sec. 171, *supra*.

¹¹¹ See authorities cited in note 102, *supra*, *Whitten, Valuation of Public Service Corporations*, secs. 122, 124; *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 381 et seq., 72 N. W. 713, 718 et seq.

turns from intrastate traffic. A state cannot require a railroad to carry local traffic at inadequate rates upon the ground that the railroad is compensated by the profitability of its interstate traffic;¹¹² and, conversely, it must follow that the federal government cannot require a railroad to carry interstate traffic at inadequate rates upon the ground that it is compensated by the profitability of its local traffic.

Proving amount of earnings.

176. In estimating the probable earnings of the company under the rates considered, the courts will not assume as a matter of law that a reduction of rates will diminish the income of the company, but such an effect must be proved.¹¹³

Rates fair to public.

177. A railroad must transport at rates which are reasonable to its patrons.¹¹⁴ While the amount of business

¹¹² See note 48 in Chap. 1, *supra*.

¹¹³ *Chicago & G. T. Ry. Co. v. Wellman* (1892) 143 U. S. 339, 12 Sup. Ct. 400, 30 L. ed. 176; *Chicago U. T. Co. v. Chicago* (1902) 199 Ill. 484, 547, 65 N. E. 451, 470, 59 L. R. A. 631, 653; *Winchester & L. T. R. Co. v. Croxton* (1896) 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177. See also *Wood v. Vandalia R. Co.* (1913) 231 U. S. 1, 34 Sup. Ct. 7, 58 L. ed.; *Railroad Comm. of La. v. Cumberland T. & T. Co.* (1909) 212 U. S. 414, 426, 427, 29 Sup. Ct. 357, 362, 363, 53 L. ed. 577; *Willcox v. Consolidated G. Co.* (1909) 212 U. S. 19, 51, 29 Sup. Ct. 192, 199, 53 L. ed. 392; *Atlantic C. L. R. Co. v. Florida* (1906) 203 U. S. 256, 260, 27 Sup. Ct. 108, 109, 51 L. ed. 174; *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 404, 14 Sup. Ct. 1047, 1057, 38 L. ed. 1014; *State v. Adams Ex. Co.* (1909) 85 Neb. 25, 32, 122 N. W. 691, 694; *Central of Ga. Ry. Co. v. McLendon* (1907) 157 Fed. 961, 976; *Smalley, Railroad Rate Control* (Publications of American Economic Assn.) 6, 7. Compare *Seaboard A. L. Ry. Co. v. Railroad Comm. of Alabama* (1907) 155 Fed. 792.

¹¹⁴ "It would not . . . be claimed that the railroads could in all cases be allowed to charge grossly exorbitant rates as compared with rates paid upon other roads, in order to pay dividends to stockholders. Each case

done by the road may affect the rates charged,¹¹⁵ a road having but little traffic may not charge extortionate rates in order to earn profits on that traffic;¹¹⁶ and while the carrier is entitled to fair compensation, so also the public is entitled to carriage at rates which are fair to it, and the state or federal government in making regulations may very properly consider the value of the services to the public.¹¹⁷

Rates fair to railroad.

178. But, if a railroad may do so consistently with the

must be determined by its own considerations, and while the rule stated in *Smyth v. Ames* [see sec. 168, supra] is undoubtedly sound as a general proposition that the railways are entitled to a fair return upon the capital invested [see sec. 168, supra] it might not justify them in charging an exorbitant mileage in order to pay operating expenses, if the conditions of the country did not permit it." *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 268, 22 Sup. Ct. 900, 905, 46 L. ed. 1151. See also *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 596, 597, 17 Sup. Ct. 198, 205, 41 L. ed. 560; *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 412, 14 Sup. Ct. 1047, 1059, 1060, 38 L. ed. 1014; *Alabama & V. Ry. Co. v. Mississippi R. Comn.* (1906) 203 U. S. 496, 501, 27 Sup. Ct. 163, 165, 51 L. ed. 289; *Puget S. E. Ry. v. Railroad Comn.* (1911) 65 Wash. 75, 87, 117 Pac. 739, 744; *Missouri, K. & T. R. Co. v. Interstate Com. Comn.* (1908) 164 Fed. 645, 648; *Brunswick & T. W. Dist. v. Maine W. Co.* (1904) 99 Me. 371, 380, 59 Atl. 537, 540; *Interstate Com. Comn. v. Louisville & N. R. Co.* (1902) 118 Fed. 613; *Bruce, State Regulation of Railroad Rates and Charges*, 62 Cent. L. J. 458, 460; *Smalley, Railroad Rate Control* (Publications of American Economic Assn.) 94, 97; *Washington S. Ry. Co. v. Commonwealth* (1911) 112 Va. 515, 71 S. E. 539; *Coal & C. Ry. Co. v. Conley* (1910) 67 W. Va. 129, 190, 67 S. E. 613, 639.

¹¹⁵ *Smyth v. Ames* (1898) 169 U. S. 466, 540, 18 Sup. Ct. 418, 431, 42 L. ed. 819.

¹¹⁶ See note 34, supra; *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560; and also *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014.

¹¹⁷ *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151. See also *Smyth v. Ames* (1898) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; and cases cited in note 114, supra. But compare authorities cited at end of note 164, infra.

above rule, it is entitled to receive a profit from the use of its property. The United States Supreme Court has not stated definitely just what rate of profit must be allowed,¹¹⁸ and there is a wide range in the decisions of the state and the lower federal courts.¹¹⁹ It is possible, however, to state the principles which should govern the courts in deciding whether or not the revenues of a railroad are reduced to an unconstitutional extent.

Constitutional rate of return.

179. As a general rule ¹²⁰ a governmental regulation should be held unconstitutional if under it the carrier is not allowed to receive from all of its transportation which is subject to that government, taken as an entirety,¹²¹ whatever rate of return it can be shown would unquestionably be received at the present time in other enterprises involving the same business hazards.¹²² Of course,

¹¹⁸ See sec. 180, *infra*.

¹¹⁹ See sec. 181, *infra*.

¹²⁰ See, however, sec. 177, *supra*.

¹²¹ See secs. 184-187, *infra*.

¹²² *Willcox v. Consolidated G. Co.* (1909) 212 U. S. 19, 48, 29 Sup. Ct. 192, 198, 53 L. ed. 382; *Pioneer T. & T. Co. v. Westenhaver* (1911) 29 Okla. 429, 459, 118 Pac. 354, 366, 38 L. R. A. N. S. 1209; *Puget S. E. Ry. v. Railroad Comn.* (1911) 65 Wash. 75, 97, 117 Pac. 739, 749; *Des Moines W. Co. v. Des Moines* (1911) 192 Fed. 193, 199; *Central of Ga. Ry. Co. v. Railroad Comn. of Alabama* (1908) 161 Fed. 925, 993; *Trustees v. Saratoga G., E. L., H. & P. Co.* (1907) 122 N. Y. App. Div. 203, 220, 107 N. Y. Supp. 341, 354; *Consolidated G. Co. v. New York* (1907) 157 Fed. 849, 871; *San Diego W. Co. v. San Diego* (1897) 118 Cal. 556, 570, 50 Pac. 633, 637, 38 L. R. A. 460; *Whitten, Valuation of Public Service Corporations*, p. 659; *Coal & C. Ry. Co. v. Conley* (1910) 67 W. Va. 129, 189, 67 S. E. 613, 639. Compare *People v. Public Service Comn.* (1912) 153 N. Y. App. Div. 129, 138 N. Y. Supp. 434; *Fenwick, The Judicial Test of a Reasonable Railroad Rate*, 8 Mich. L. Rev. 445, 447, 448; note 123, *infra*. On this subject as on so many others the opinion of the majority of the court in *Pennsylvania R. Co. v. Philadelphia County* (1908) 220 Pa. 100, 115, 68 Atl. 676, 679, 15 L. R. A. N. S. 108, 117, is clearly wrong. The opinion refers to the original

the amount of risk involved and the rate of return necessarily vary from time to time and in different parts of the country;¹²³ and a change in economic conditions may make regulations which have been constitutional become unconstitutional or make regulations which have been unconstitutional become constitutional.¹²⁴

Yet, on the other hand, the court has no right to consider whether it would have established the schedule involved if it had been given the power.¹²⁵ It has no right to apply common law tests.¹²⁶ The question before it is simply whether the schedule of rates which was established by the appropriate organ of government clearly violates the Constitution.¹²⁷ The amount of compensa-

risks of the business. The original risk is as objectionable a basis as the original value. And see Whitten, *op. cit.*, p. 702.—It does not follow that if other businesses are not regulated railroads may not be regulated: with Central of Ga. Ry. Co. v. R. Comn. of Alabama (1908) 161 Fed. 925, 995, compare Chap. 5, *supra*.

¹²³ Willcox v. Consolidated G. Co. (1909) 212 U. S. 19, 48, 29 Sup. Ct. 192, 198, 53 L. ed. 382; Pioneer T. & T. Co. v. Westenhaver (1911) 29 Okla. 429, 459, 118 Pac. 354, 366, 38 L. R. A. N. S. 1209; Puget S. E. Ry. v. Railroad Comn. (1911) 65 Wash. 75, 97, 117 Pac. 739, 748; Brunswick & T. W. Dist. v. Maine W. Co. (1904) 99 Me. 371, 380, 59 Atl. 537, 540. And it may differ in different parts of the country: Steenerson v. Great N. Ry. Co. (1897) 69 Minn. 353, 365-390, 72 N. W. 713, 719-721. The legal rate varies greatly in different parts of the country.

¹²⁴ See Missouri Rate Cases—Knott v. Chicago, B. & Q. R. Co. (1913) 230 U. S. 474, 508, 33 Sup. Ct. 975, 983, 57 L. ed. 1595; Minnesota Rate Cases—Simpson v. Shepard (1913) 230 U. S. 352, 473, 33 Sup. Ct. 729, 769, 57 L. ed. 1511; Smyth v. Ames (1898) 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 197; Coal & C. Ry. Co. v. Conley (1910) 67 W. Va. 129, 203, 67 S. E. 613, 645; Chicago & N. W. Ry. Co. v. Dey (1888) 35 Fed. 866, 875, 1 L. R. A. 744, 750. Compare Steenerson v. Great N. Ry. Co. (1897) 69 Minn. 353, 387, 390, 72 N. W. 713, 720, 721.

¹²⁵ See sec. 33, *supra*; and Whitten, Valuation of Public Service Corporations, pp. 690 et seq., and cases there cited.

¹²⁶ See sec. 33, *supra*.

¹²⁷ See references in note 125, *supra*. The correct position is taken in the opinion of Stewart, J., dissenting, in Pennsylvania R. Co. v. Philadelphia County (1908) 220 Pa. 100, 133, 68 Atl. 676, 681, 15 L. R. A. 108, 119.

tion for property taken for public use is not primarily a judicial question;¹²⁸ and even where it is contended that the railroad is not being accorded the equal protection of the laws, it must be remembered that the court concedes that legislatures and commissions possess considerable lee-way.¹²⁹

But before going further let us note the decisions on the rate of return to which we have already referred.¹³⁰

No particular rate fixed by Supreme Court.

180. As we have already seen,¹³¹ the United States Supreme Court has not fixed definitely the extent to which the rate of return to the carrier may be reduced. Some years ago it declared that "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. . . . Each case must depend upon its special facts."¹³² The court has not even named a rate of return upon the proper valuation to which a railroad would be entitled in normal cases. In a gas case it conceded that under the facts of the case the company was entitled to six per cent upon the value of the property, although it reversed a decree which enjoined the enforcement of the statute involved;¹³³ and yet on the same day in a water case in which the opinion was handed down by

¹²⁸ See *Bauman v. Ross* (1897) 167 U. S. 548, 593, 17 Sup. Ct. 966, 983, 42 L. ed. 270, cases there cited, and discussion in note 17 of Chap. 2, *supra*.

¹²⁹ See secs. 139, 140, 143, *supra*. Compare 7 A. & E. An. Cas. 478.

¹³⁰ In sec. 178, *supra*.

¹³¹ See sec. 178, *supra*.

¹³² *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 596, 597, 17 Sup. Ct. 198, 205, 41 L. ed. 560.

¹³³ *Willcox v. Consolidated G. Co.* (1909) 212 U. S. 19, 50, 29 Sup. Ct. 192, 199, 53 L. ed. 382.

another justice the court did not feel called upon to determine whether a demonstrated reduction of income to four per cent would or would not be constitutional.¹³⁴ In an earlier case it had said that it could not declare an act unconstitutional merely because under it the company could not earn more than four per cent upon its capital stock.¹³⁵ The court has, however, declared unconstitutional regulations which left little or no return to investors in the property;¹³⁶ and, on the other hand, it has sustained a law which limited the return to an irrigation

¹³⁴ *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 17, 29 Sup. Ct. 148, 154, 53 L. ed. 371.

¹³⁵ "It is proper to say that if the answer had not alleged, in substance, that the tolls prescribed by the act of 1890 were wholly inadequate for keeping the road in proper repair and for earning dividends, we could not say that the act was unconstitutional merely because the company (as was alleged and as the demurrer admitted) could not earn more than four per cent on its capital stock:" *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 596, 17 Sup. Ct. 198, 205, 41 L. ed. 560.

¹³⁶ As the court said in *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 17, 29 Sup. Ct. 148, 153, 53 L. ed. 371, "It cannot be doubted that in a clear case of confiscation it is the right and duty of the court to annul the law. Thus in *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014, where the property was worth more than its capitalization, and upon the admitted facts the rates prescribed would not pay one-half the interest on the bonded debt; in *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560, where the rates prescribed would not even pay operating expenses; in *Smyth v. Ames* (1898) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, where the rates prescribed left substantially nothing over operating expenses and cost of service; and in *Ex parte Young* (1908) 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. N. S. 932, 14 A. & E. An. Cas. 764, where, on the aspect of the case which was before the court, it was not disputed that the rates prescribed were in fact confiscatory, injunctions were severally sustained. But the case before us is not a case of this kind." See also *Southern Ry. Co. v. St. Louis H. & G. Co.* (1909) 214 U. S. 297, 29 Sup. Ct. 678, 53 L. ed. 1004; *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 469-473, 33 Sup. Ct. 729, 768, 769, 57 L. ed. 1511. Compare *Norfolk & S. T. Co. v. Virginia* (1912) 225 U. S. 264, 32 Sup. Ct. 828, 56 L. ed. 1082, where the court sustained a statute which made the keeping of a toll road in repair a condition precedent to the right to collect tolls. To the same effect is *Back R. N. T. Co. v. Homberg* (1903) 96 Md. 430, 54 Atl. 82.

company to six per cent,¹³⁷ and an ordinance under which a gas company received more than six per cent.¹³⁸

Other decisions in conflict.

181. There is also a wide range in the decisions of the state and lower federal courts. It has been held, for example, that "the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the legislature is the sole judge."¹³⁹ And in other cases state regulations have been sustained although the rates of return from the property were not large.¹⁴⁰

¹³⁷ *Stanislaus County v. San Joaquin & K. R. C. & I. Co.* (1904) 192 U. S. 201, 213, 24 Sup. Ct. 241, 246, 48 L. ed. 406. Compare *Louisville v. Cumberland T. & T. Co.* (1912) 225 U. S. 430, 436, 32 Sup. Ct. 741, 742, 56 L. ed. 1151.

¹³⁸ *Cedar Rapids G. L. Co. v. Cedar Rapids* (1912) 223 U. S. 655, 32 Sup. Ct. 389, 56 L. ed. 594.

¹³⁹ *Chicago & N. W. Ry. Co. v. Dey* (1888) 35 Fed. 866, 878, 879, 1 L. R. A. 744, 752. See also *Chicago, B. & Q. R. Co. v. Dey* (1889) 38 Fed. 656, 663; *Tilley v. Savannah, F. & W. R. Co.* (1881) 5 Fed. 641, 663, 664. Compare comments on above language in *Southern P. Co. v. Board of R. Comrs.* (1896) 78 Fed. 236, 261.

¹⁴⁰ 4 2-5% held constitutional. "This estimate of earnings may be very materially reduced, or the estimate of the value of the plant be very materially increased, before the court will be justified in saying that the plaintiff's property is being exposed to destruction or confiscation by an unprofitable schedule of rates:" *Cedar R. W. Co. v. Cedar Rapids* (1902) 118 Iowa, 234, 262, 91 N. W. 1081, 1091. 2½% on terminals and 5% on remainder of road not confiscatory: *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 384, 389, 72 N. W. 713, 719, 721. 5% not confiscatory, in spite of fact that current rates of interest were temporarily higher: *Spring V. W. Co. v. San Francisco* (1908) 165 Fed. 667, 684, 685. See also *Central of Ga. Ry. Co. v. McLendon* (1907) 157 Fed. 961, 974; *Cedar R. G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 450, 120 N. W. 966, 974. Earnings of 6% or over sustained in *Home T. Co. v. Carthage* (1911) 235 Mo. 644, 667, 139 S. W. 547, 553; *Arkadelphia E. L. Co. v. Arkadelphia* (1911) 99 Ark. 178, 188, 137 S. W. 1093, 1097;

But, on the other hand, other courts have declared unconstitutional not only regulations which left returns insufficient to pay operating expenses or insufficient to pay any returns to stockholders,¹⁴¹ but also regulations which allowed greater returns from the property,¹⁴² in some cases declaring that the carriers were entitled to at least six per cent,¹⁴³ and in other cases that

Puget S. E. Ry. v. Railroad Comn. (1911) 65 Wash. 75, 97, 117 Pac. 739, 749.—On this note see also Whitten, *Valuation of Public Service Corporations*, chap. 30.

¹⁴¹ *Louisville & N. R. Co. v. Railroad Comn. of Alabama* (1912) 196 Fed. 800, 819; *Cumberland T. & T. Co. v. Memphis* (1908) 183 Fed. 875, 876; *In re Arkansas R. Rates* (1908) 163 Fed. 141, 143; *Seaboard A. L. Ry. Co. v. Railroad Comn.* (1907) 155 Fed. 792, 807; *Ozark-Bell T. Co. v. Springfield* (1905) 140 Fed. 666, 669; *Wallace v. Arkansas C. R. Co.* (1902) 118 Fed. 422, 424. See also *Morgan's L. & T. R. Co. v. Railroad Comn. of La.* (1911) 127 La. 636, 670, 53 So. 890, 902; *Gulf, C. & S. F. Ry. Co. v. Railroad Comn. of Texas* (1909) 102 Tex. 338, 116 S. W. 795; *Southern I. Ry. Co. v. Railroad Comn.* (1909) 172 Ind. 113, 128, 87 N. E. 966, 971; *Southern Ry. Co. v. McNeill* (1907) 155 Fed. 756, 788; *Chicago C. Ry. Co. v. Chicago* (1905) 142 Fed. 844; *Pensacola & A. R. Co. v. State* (1889) 25 Fla. 310, 332, 333, 5 So. 833, 843, 3 L. R. A. 661. Compare *Boise City I. & L. Co. v. Clark* (1904) 131 Fed. 415, 422; *State v. Sutton* (1912) 84 N. J. L., 84 Atl. 1057; sec. 186, *infra*.

¹⁴² 1.21% held confiscatory: *Trust Co. of A. v. Chicago, P. & St. L. Ry. Co.* (1912) 199 Fed. 593, 610. 3.97% held confiscatory: *Spring V. W. W. v. San Francisco* (1911) 192 Fed. 137, 193. 4½% held confiscatory: *Milwaukee E. Ry. & L. Co. v. Milwaukee* (1898) 87 Fed. 577, 585, 586. Water company entitled to at least 5%: *Spring V. W. W. v. San Francisco* (1903) 124 Fed. 574, 599; followed in *Contra Costa W. Co. v. Oakland* (1904) 165 Fed. 518, 532. Water company should receive at start 5%: *Long Branch Comn. v. Tintern M. W. Co.* (1905) 70 N. J. Eq. 71, 94, 95, 62 Atl. 474, 482, 483.—On this note see also Whitten, *Valuation of Public Service Corporations*, chap. 30.

¹⁴³ *St. Louis & S. F. R. Co. v. Hadley* (1909) 168 Fed. 317, 324, 354; *Trust Co. of A. v. Chicago, P. & St. L. Ry. Co.* (1912) 199 Fed. 593, 605. See also *Owensboro v. Cumberland T. & T. Co.* (1909) 174 Fed. 739. Entitled to 6%, but that rate shown in this case: *Lincoln G. & E. L. Co. v. Lincoln* (1909) 182 Fed. 926, 929, reversed on another ground in *Lincoln G. & E. L. Co. v. Lincoln* (1912) 223 U. S. 349, 32 Sup. Ct. 271, 56 L. ed. 466. Not less than the legal rate of interest (6%). In other words, the maximum rate allowed on loans, however great the risk, is necessarily the minimum rate which may constitutionally be allowed on investments in

they were entitled to seven ¹⁴⁴ or seven and a half ¹⁴⁵ or even eight per cent.¹⁴⁶

Distribution between stockholders and bondholders.

182. We have already seen that the principal upon which the return is to be based is the cost of producing at the present time a railroad which would be equally effi-

railroad securities): *Pennsylvania R. Co. v. Philadelphia County* (1906) 220 Pa. 100, 114, 68 Atl. 676, 678, 15 L. R. A. N. S. 108, 117. Entitled to 6%. "He would expect, and have a just and reasonable right to expect, a return of 6%, not because that happens to be the interest rate by law established in the state of New York, but because it is the return ordinarily sought and obtained on investments of that degree of safety in the city of New York." "As was observed by counsel, equally learned in law and politics, it would be easy to amend the legal rate, and judicial dependence upon an interest rate susceptible of change by the same legislature that regulates the rate of earnings would be, to say the least, inadvisable." *Consolidated Gas Co. v. New York* (1907) 157 Fed. 849, 871, 870, reversed on another ground in *Willecox v. Consolidated Gas Co.*, cited in note 133, supra. —Entitled to "amount equal, at least, to the usual and legal rate of interest in the locality where the railroad is situated:" *Louisville & N. R. Co. v. Brown* (1903) 123 Fed. 946, 951. See also *Pioneer T. & T. Co. v. Westenhaver* (1911) 29 Okla. 429, 460, 118 Pac. 354, 366, 38 L. R. A. N. S. 1209. Compare *Brunswick & T. W. Dist. v. Maine W. Co.* (1904) 99 Me. 371, 379, 380, 59 Atl. 537, 540, which did not involve the constitutionality of rate regulations but in which the court said that "An equivalent to the prevailing rate of interest might be a reasonable return, and it might not. It might be too high or it might be too low."

¹⁴⁴ *Shepard v. Northern P. Ry. Co.* (1911) 184 Fed. 765, 816, reversed on another ground in *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511; *Cumberland T. & T. Co. v. Louisville* (1911) 187 Fed. 637, 658; *Cumberland T. & T. Co. v. Railroad Comn. of La.* (1907) 156 Fed. 823, 833, 834, reversed on another ground in *Railroad Comn. of La. v. Cumberland T. & T. Co.* (1909) 212 U. S. 414, 29 Sup. Ct. 357, 53 L. ed. 577.

¹⁴⁵ *In re Arkansas Rate Cases* (1911) 187 Fed. 290, 348.

¹⁴⁶ *Des Moines W. Co. v. Des Moines* (1911) 192 Fed. 193, 199. "The current rate of profit upon property used in business enterprises similar to railroads gives a net income upon the value of such property not lower than 8% per annum. Whether we take the legal rate of profit by way of interest on loans of money, or the rate of profit which common experience shows to be the average, and, therefore, approximately a just, return from

cient.¹⁴⁷ This is true whether the road was built entirely from money contributed by the stockholders or whether most of the capital came from bondholders. It is only the completed road which is considered.

For this reason the rate of return to the company cannot depend upon how much of the revenue is to go to bondholders and how much to stockholders.¹⁴⁸ The methods of financing any particular company cannot be allowed to make any difference in the results. The hazards of the business are to be considered as falling upon the company as a whole and not as the risks of the stockholders or the bondholders as separate classes.¹⁴⁹ If, then, the company has made a bad bargain with its bondholders the stockholders should suffer from it, just as they should suffer if the company has made a bad bargain with a construction company; and, on the other hand, if the company has secured money from bondholders upon favorable terms the stockholders certainly are entitled to the advantages which should come from good financial management.¹⁵⁰

EXCEPTIONAL CONDITIONS.

183. As we have already said, while the factors which we have considered govern normal cases in which it is

the use of other forms of property, both modes lead to the same result:" *Central of Ga. Ry. Co. v. Railroad Comn. of Alabama* (1908) 161 Fed. 925, 996. See also *Montana, W. & S. R. Co. v. Morley* (1912) 198 Fed. 991, 1007.

¹⁴⁷ See sec. 157, *supra*.

¹⁴⁸ See sec. 156, *supra*.

¹⁴⁹ The risk per dollar upon the property as a whole is less than the risk per dollar on the investment of stockholders and greater than the risk per dollar on the investment of bondholders, where a large part of the capital comes from bondholders.

¹⁵⁰ On this section as a whole see Whitten, *Valuation of Public Service Corporations*, secs. 792, 735; *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 385-389, 72 N. W. 713, 719-721.

claimed that the schedules as entireties are unconstitutional, there are also at times exceptional conditions which must be taken into consideration.¹⁵¹

Some of the questions which may be raised are easily solved. Thus, while a schedule of rates may be constitutional at one time and unconstitutional at another time,¹⁵² the courts would doubtless recognize the importance to the public of stability of rates¹⁵³ and would not declare that rates which had been constitutional became unconstitutional because of a change in conditions which was slight or appeared likely to be of but short duration.¹⁵⁴ And, on the other hand, if a railroad were built for a temporary purpose, as in the case of a logging railroad, where the sources of traffic would be depleted within a few years, it would unquestionably be entitled during the years when it was being used for that purpose to a higher rate of return upon the value of its property than could be claimed in the case of a normal road.¹⁵⁵

But it is not clear just how far a railroad must be allowed to earn a revenue upon value which does not represent investment. Where there has been a general increase in the value of land in the territory through which a rail-

¹⁵¹ Sec. 154, *supra*.

¹⁵² Sec. 179, *supra*.

¹⁵³ Sec. 177, *supra*.

¹⁵⁴ Sec. 158, *supra*.

¹⁵⁵ In the case of a road properly located which would completely exhaust the sources of traffic within ten years from the time of its construction, the depreciation during those ten years would be the difference between the cost of reproduction new at the beginning of that period and the value at the end of that period of the property for purposes other than the use of that particular road. Earnings during those ten years should not only yield adequate returns upon the value of the property but should also be sufficient to cover that depreciation. As to roads whose traffic is insufficient to warrant returns upon the full cost of reproduction see authorities cited in note 34, *supra*.

road runs, a similar increase in the value of the land of the company should be recognized;¹⁵⁶ yet if land immediately along the route of a railroad has increased in value because of the presence of the railroad to a greater extent than land more remote from the tracks, that part of the increase in value should be ignored.¹⁵⁷ And if a railroad were allowed by a state to extend its tracks through property of which the title remained in the state, the value of that right of way could not be included in the value upon which the railroad was entitled to earn a revenue.¹⁵⁸ But would or would not the law be different if the state had conveyed title in that land to the railroad company and the company insisted upon receiving an income sufficient to allow of returns upon that part of its property?¹⁵⁹

PARTICULAR RATES.

Decisions that only schedule as entirety may be considered.

184. Thus far we have considered simply cases in which it was claimed that the schedule as an entirety was unconstitutional. We must now observe cases in which the attack is restricted to part of the rates.

The court has declared repeatedly that if the state al-

¹⁵⁶ See secs. 155 et seq., 175, *supra*; Whitten, *Valuation of Public Service Corporations*, chap. 6. But compare *Willcox v. Consolidated G. Co.* (1909) 212 U. S. 19, 52, 29 Sup. Ct. 192, 200, 53 L. ed. 382; *In re Advances in Rates—Western Case* (1911) 20 I. C. C. 307, 337 et seq.

¹⁵⁷ See note 30, *supra*.

¹⁵⁸ *Lincoln G. & E. L. Co. v. Lincoln* (1909) 182 Fed. 926, 928. See also *Cedar R. G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 437, 438, 120 N. W. 966, 970.

¹⁵⁹ As bearing on this question see *Cumberland T. & T. Co. v. Louisville* (1911) 187 Fed. 637, 647; *Cedar R. G. L. Co. v. Cedar Rapids* (1909) 144 Iowa, 426, 437, 438, 120 N. W. 966, 970; Whitten, *Valuation of Public Service Corporations*, p. 111, chaps. 8, 7.

lows a railroad to earn a suitable revenue from its local business as a whole it may require the company to carry at unprofitable rates upon separate parts of the road¹⁶⁰ and upon separate kinds of traffic.¹⁶¹ Such statements

¹⁶⁰ *St. Louis & S. F. Ry. Co. v. Gill* (1895) 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567. The question is discussed more fully in *St. Louis & S. F. Ry. Co. v. Gill* (1891) 54 Ark. 101, 15 S. W. 18, 11 L. R. A. 452. See also *Chicago U. T. Co. v. Chicago* (1902) 199 Ill. 579, 65 N. E. 470; *Southern P. Co. v. Board of R. Comrs.* (1896) 78 Fed. 236, 263, 264; *Missouri P. Ry. Co. v. Smith* (1895) 60 Ark. 221, 29 S. W. 752; *Ex parte Koehler* (1885) 23 Fed. 529; *Wyman, Public Service Corporations*, sec. 1175. And see *Interstate Com. Comm. v. Louisville & N. R. Co.* (1902) 118 Fed. 613, where losses on one part of the line did not justify the rates there charged by the carrier. Compare *Steenerson v. Great N. Ry. Co.* (1897) 69 Minn. 353, 72 N. W. 713, which decides that "where . . . portion of the line is not self-supporting, but is an encumbrance on, and not a feeder of, the rest of the line or system, . . . in determining what are reasonable rates for the rest of the line or system, such portion may be rejected."

¹⁶¹ In the *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 466, 33 Sup. Ct. 729, 767, 57 L. ed. 1511, the court said, "We express no opinion with respect to the method adopted in dividing expenses between the passenger and freight departments. For the purpose of determining whether the rates permit a fair return, the results of the entire intrastate business must be taken into account." In *Willcox v. Consolidated Gas Co.* (1909) 212 U. S. 19, 54, 29 Sup. Ct. 192, 200, 201, 53 L. ed. 382, the court said, "The only interest of the complainant in question is to find out whether, by the reduction to the city, the complainant is upon the whole unable to realize a return sufficient to comply with what it has the right to demand. . . . We cannot see from the whole evidence that the price fixed for gas supplied to the city by wholesale, so to speak, would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant. So long as the total is enough to furnish such return it is not important that with relation to some customers the price is not enough." See also 212 U. S. at 21. In *Minneapolis & St. L. R. Co. v. Minnesota* (1902) 186 U. S. 257, 22 Sup. Ct. 900, 46 L. ed. 1151, where the constitutionality of coal rates was considered, the court said, "Notwithstanding the evidence of the defendant that, if the rates upon *all* merchandise were fixed at the amount imposed by the commission upon coal in carload lots, the road would not pay its operating expenses, it may well be that the existing rates upon other merchandise, which are not disturbed by the commission may be sufficient to earn a large profit to the company, though it may earn little or nothing upon coal in carload lots. In *Smyth v. Ames* we expressed the opinion that the reasonableness or unreasonableness of rates prescribed

by a state for the transportation of persons or property wholly within its limits, must be determined without reference to the interstate business done by the carrier, or the profits derived from it, but it by no means follows that the companies are entitled to earn the same percentage of profits upon all classes of freight carried. . . . We do not think it beyond the power of the state commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and the burden is upon them to impeach the action of the commission in this particular. . . . In exercising its power of supervising such rates the commission is not bound to reduce the rates upon *all* classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwithstanding that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate. . . . It is sufficient, however, for the purpose of this case to say that the action of the commission in fixing the rate has not been shown to be so unjust or unreasonable as to amount to a taking of property without due process of law." In *Smyth v. Ames* (1898) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819, it was decided that the rates as an entirety were so low as to prevent the companies from earning just compensation. In fact only the freight rates were considered. The decree therein was modified later (1898) 171 U. S. 361, 18 Sup. Ct. 888, 43 L. ed. 197, the court saying, "It was appropriate and necessary to inquire as to the earnings of the respective companies under the rates which they had established—looking at those rates, also, as an entirety. In this way we ascertained the probable effect of the statute in question. We did not intend, by an affirmance of the several decrees, to adjudge that the railroad companies should not, at any time in the future, if they saw proper, reduce the rates, or any of them, under which they were conducting business at the time the final decrees were rendered, nor that the state board of transportation should not reduce rates on specific or particular articles below the rates which the companies were charging on such articles when the decrees were entered. It may well be that on some particular article the railroad companies may deem it wise to make a reduction of the rate, and it may be that the public interests will justify the state board of transportation in ordering such reduction. We have not laid down any cast-iron rule covering each and every separate rate. We only adjudged that the enforcement of the schedule of rates established by the state statute, looking at such rates as a whole, would deprive the railroad companies of the compensation they were legally entitled to receive. We did not pass judgment upon the reasonableness or unreasonableness of the rates on any particular article prescribed by the statute or by the railroad companies. If the state should by statute, or through its board of trans-

have been made in a number of leading cases; and the same position has been taken by state and lower federal courts.¹⁶²

portation, prescribe a new schedule of rates, covering substantially all articles, and which would materially reduce those charged by the companies respectively, or should by a reduction of rates on a limited number of articles make its schedule of rates, as a whole, produce the same result, the question will arise whether such rates, taking into consideration the rights of the public as well as the rights of carriers, are consistent with the principles announced by this court in the opinion heretofore delivered." In *St. Louis & S. F. Ry. Co. v. Gill* (1895) 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567 (1891) 54 Ark. 112, 15 S. W. 18, 11 L. R. A. 452, a decision that the company may be required to carry at a loss upon separate parts of the road was sustained by reasoning which apparently would apply to the carriage of separate kinds of traffic.

¹⁶² In *Matthews v. Board of Corp. Comrs.* (1901) 106 Fed. 7, 10, where it was not shown that the particular order of the commission was unjust, the court said, citing *Smyth v. Ames* (note 161, *supra*), that "the Supreme Court of the United States, in deciding whether the rates fixed under legislative authority violate the Fourteenth Amendment, do not rest their judgment on one set of rates for specific articles, but they take into consideration all the rates on all articles, and decide whether, as a whole, the result is unreasonable." *Smyth v. Ames* does not establish such a rule, although consistent with it. In *Missouri P. Ry. Co. v. Smith* (1895) 60 Ark. 221, 29 S. W. 752, an allegation that statutory rates of fare were inadequate was held bad on demurrer because it did not show that statutory rates prevented a profit on the company's traffic as a whole. In *Chicago & N. W. Ry. Co. v. Dey* (1888) 35 Fed. 866, 881, 1 L. R. A. 744, 753, the court granted a preliminary injunction restraining the enforcement of a schedule of freight charges, but said that "the schedule as a whole must control, and its validity or invalidity does not depend upon the sufficiency or insufficiency of the rates for any few particular subjects of transportation." In *Pensacola & A. R. Co. v. State* (1889) 25 Fla. 310, 331, 342, 5 So. 833, 842, 847, 3 L. R. A. 661, 669, 672, decided after the Minnesota case referred to in note 163, *infra*, had been decided by the state court but before it had been passed upon by the higher court, that case was distinguished as not "involving the entire rates, but only the rate on one article, and there was no contention that the entire tariffs, as prescribed by the commissioners, would not pay operating expenses. The fact that the tariff on simply one or several articles may be unremunerative is not ground for an assumption that the tariffs are so as a whole, nor reason to our minds for judicial interference in behalf of the railroad company." In the Florida case a plea that the passenger rates were unremunerative was insufficient, but a further plea that the rates as a whole were unremunerative was held to be good. See also *People v. Public Service Comn.* (1912)

Decisions on particular rates.

185. On the other hand, without discussing the question, the court has declared unconstitutional Minnesota regulations which related only to milk rates¹⁶³ and Nebraska regulations which related only to freight rates;¹⁶⁴ and in a recent case, while it refused to declare a particular rate invalid, saying that the evidence was insufficient and calling attention to "the great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned,"¹⁶⁵ it affirmed the decree of the state court "without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if,

153 N. Y. App. Div. 129, 138 N. Y. Supp. 434; *Ex parte Koehler* (1885) 23 Fed. 529, 532.

¹⁶³ *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970. Nothing was said as to the revenue from the local traffic as a whole. See also *Southern P. Co. v. Campbell* (1911) 189 Fed. 182. Compare *Gulf, C. & S. F. Ry. Co. v. Railroad Comn. of Texas* (1909) 102 Tex. 338, 116 S. W. 795. The Minnesota case turned more upon the common law and the powers of the courts at common law than do later cases.

¹⁶⁴ *Smyth v. Ames*, cited in note 161, *supra*. See also *Chicago & N. W. Ry. Co. v. Dey*, cited in note 162, *supra*.

¹⁶⁵ See also *Northern P. Ry. Co. v. Lee* (1912) 199 Fed. 621, 632, and cases there cited; *Atlantic C. L. R. Co. v. Florida* (1906) 203 U. S. 256, 260, 27 Sup. Ct. 108, 109, 51 L. ed. 174; *Atchison, T. & S. F. Ry. Co. v. United States* (1913) 203 Fed. 56, 59.—On the apportionment of the value of the property to find the basis on which to estimate the reasonableness of rates on particular classes of traffic, see the discussion in sec. 166, *supra*. On the propriety of considering the value of the service to the patron, see *United States v. Chandler-Dunbar W. P. Co.* (1913) 229 U. S. 53, 76, 33 Sup. Ct. 667, 677, 57 L. ed. 1063; *Boston Chamber of Commerce v. Boston* (1910) 217 U. S. 189, 194, 30 Sup. Ct. 459, 460, 54 L. ed. 725; *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 451, 33 Sup. Ct. 729, 761, 57 L. ed. 1511; *Clyde v. Richmond & D. R. Co.* (1893) 57 Fed. 436, 440; *Salt R. V. C. Co. v. Nelssen* (1906) 10 Ariz. 9, 85 Pac. 117, 12 L. R. A. N. S. 711; *Hearings of Senate Committee on Interstate Commerce*, April, 1905, vol. II, p. 1099; *Freund, Police Power*, pp. 578, 579. But compare sec. 177, *supra*.

after adequate trial, it thinks it can prove more clearly than at present the confiscatory character of the rates for coal.''¹⁶⁶

Discussion on considering merely schedule as entirety.

186. From these authorities it seems clear that the fact that the rates for a portion of the transportation are unprofitable does not necessarily render the governmental regulations unconstitutional. The state may require a railroad to render services for which it cannot expect any adequate return;¹⁶⁷ and it may require a public service corporation to render services to patrons whose calls upon it are light at the same rate as is charged to patrons whose calls upon it are heavier, although in the former case the services must be rendered at a loss.¹⁶⁸ And so, even if it were proved that under a particular regulation the company would not receive even the operating expenses, the regulations would not necessarily be unconstitutional.¹⁶⁹

¹⁶⁶ *Northern P. Ry. Co. v. North Dakota* (1910) 216 U. S. 579, 581, 30 Sup. Ct. 423, 424, 54 L. ed. 634. See also *Wood v. Vandalia R. Co.* (1913) 231 U. S. 1, 34 Sup. Ct. 7, 58 L. ed.; dicta in *Interstate Com. Comm. v. Union P. R. Co.* (1912) 222 U. S. 541, 32 Sup. Ct. 108, 56 L. ed. 308; and cases in note 173, *infra*.

¹⁶⁷ *Atlantic C. L. R. Co. v. North Carolina Corp. Comm.* (1907) 206 U. S. 1, 24, 25, 27 Sup. Ct. 585, 594, 51 L. ed. 933; *State v. Louisville & N. R. Co.* (1912) 62 Fla. 315, 57 So. 175; *State v. Missouri P. Ry. Co.* (1907) 76 Kan. 467, 491, 92 Pac. 606, 614; *Washington S. Ry. Co. v. Commonwealth* (1911) 112 Va. 515, 71 S. E. 539; and see note 169, *infra*. Compare *George v. Chicago, R. I. & P. Ry. Co.* (1908) 214 Mo. 551, 113 S. W. 1099; *State ex rel. Washington M. Co. v. Great N. Ry. Co.* (1906) 43 Wash. 658, 86 Pac. 1056, 6 L. R. A. N. S. 908; *Chicago C. Ry. Co. v. Chicago* (1905) 142 Fed. 844; note 141, *supra*.

¹⁶⁸ *Lincoln G. & E. L. Co. v. Lincoln* (1909) 182 Fed. 926, 929. See also *Puget S. E. Ry. v. Railroad Comm.* (1911) 65 Wash. 75, 87, 96, 117 Pac. 739, 744, 748; *Wyman, Business Policies Inconsistent with Public Employment*, 20 Harv. L. Rev. 511, 514.

¹⁶⁹ See, e. g., *Boise City I. & L. Co. v. Clark* (1904) 131 Fed. 415, 422; *state v. Sutton* (1912) 84 N. J. L., 84 Atl. 1057; *Ex parte Koehler* (1885)

Yet, on the other hand, it seems that it would be going too far to say that if the rates as a whole yield an adequate return every particular rate must be constitutional. Regulations which limit part of the rates cannot be enjoined merely because under them the rates as an entirety will not yield a sufficient return;¹⁷⁰ and, conversely, regulations of particular rates should not be sustained merely because a sufficient return is secured from the rates as an entirety. The court should, rather, say that if the total returns are adequate something more than the inadequacy of particular returns would have to be shown before the particular rates could be held unconstitutional.¹⁷¹ It should say that before the particular regulations could be declared unconstitutional—certainly in any cases other than those arising under the just compensation provision of the Fifth Amendment, which relates only to the federal government—it would be necessary to show clearly that the organ of government which had power to decide upon questions of policy¹⁷² had acted so outrageously that there could be no honest difference of opinion that it was committing an act of spoliation under the guise of regulating rates.¹⁷³

23 Fed. 529, 532. Compare *Lehigh V. R. Co. v. United States* (1913) 204 Fed. 986; *Atchison, T. & S. F. Ry. Co. v. United States* (1913) 203 Fed. 56, 59; *Morgan's L. & T. R. Co. v. Railroad Comn. of La.* (1911) 127 La. 636, 667, 53 So. 890, 901; *Chicago, St. P., M. & O. Ry. Co. v. Becker* (1888) 35 Fed. 883; and end of note 167, *supra*.

¹⁷⁰ *Northern P. Ry. Co. v. Lee* (1912) 199 Fed. 621. See also *Higginson v. Chicago, B. & Q. R. Co.* (1900) 100 Fed. 235.

¹⁷¹ *Atlantic C. L. R. Co. v. North Carolina Corp. Comn.* (1907) 206 U. S. 1, 24, 25, 27 Sup. Ct. 585, 594, 51 L. ed. 933; *State v. Missouri P. Ry. Co.* (1907) 76 Kan. 467, 491, 92 Pac. 606, 614.

¹⁷² See sec. 140, *supra*.

¹⁷³ Of course, the rule may be different where special provisions of state constitutions or statutory grants of power to commissions are involved: see *Morgan's L. & T. R. Co. v. Railroad Comn. of La.* (1911) 127 La. 636, 665, 53 So. 890, 900; *Gulf, C. & S. F. Ry. Co. v. Texas* (1909) 102 Tex.

Mileage books.

187. The court has, however, decided that a state may not require a railroad company to sell mileage books at a lower rate per mile than the company is authorized to charge for ordinary tickets.¹⁷⁴ From this decision three justices dissented; and it is clearly unsound.

Before as well as after the enactment of the law many railroads issued mileage books at reduced rates, good for extended periods, and the court did not criticise this custom.¹⁷⁵ The objection, and the only real objection, to the law was that it regulated the railroads in a respect in which a majority of the court thought that the companies should be left free from regulation; and as the court has

338, 116 S. W. 795; *Pennsylvania R. Co. v. Philadelphia County* (1908) 220 Pa. 100, 68 Atl. 676, 15 L. R. A. N. S. 108. With opinion in case last cited compare *Hadley, Railroad Rate Regulation*, 7 *The Brief*, 175, 184; *Robinson, The Legal, Economic and Accounting Principles Involved in the Judicial Determination of Railway Passenger Rates*, 16 *Yale Review*, 355, 360.

¹⁷⁴ *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858. See also *State v. Bonneval* (1911) 128 La. 902, 55 So. 569; *Commonwealth v. Atlantic C. L. R. Co.* (1906) 106 Va. 61, 55 S. E. 572, 7 L. R. A. N. S. 1086, and cases cited in note in 7 L. R. A. N. S.; *State v. Great N. Ry. Co.* (1908) 17 N. D. 370, 116 N. W. 89; *Bruce, State Regulation of Railroad Rates and Charges*, 62 *Cent. L. J.* 458, 464; *Wyman, Business Policies Inconsistent with Public Employment*, 20 *Harv. L. Rev.* 511, 514; note in 14 *Harv. L. Rev.* at 143. As pointed out in *Wisconsin, M. & P. Ry. Co. v. Jacobson* (1900) 179 U. S. 287, 21 Sup. Ct. 115, 45 L. ed. 1194, the essential question in *L. S. & M. S. Ry. Co. v. Smith* was as to the power of the state to establish a lower charge for mileage books than for ordinary tickets. It was not shown that the lower rate would have been inadequate if applied to all passenger traffic. (This point was urged, and the court replied that the fact that the state had not fixed such rates for all passenger traffic afforded a presumption that a law fixing such rates would be invalid. In other words, constitutional limitations are presumed to be the only deterrents to legislative action. Is this true?) It did not appear that the rates would have been inadequate if applied to all passenger traffic. But the law did not go so far. The lower rate applied only to mileage tickets. Compare notes 178, 179, *infra*.

¹⁷⁵ See also *State v. Sutton* (1912) 84 N. J. L., 84 Atl. 1057.

no power to declare legislation invalid simply upon the ground that it is unwise or unjust,¹⁷⁶ such an objection cannot properly be considered.¹⁷⁷

Moreover, the decision is inconsistent with that in the later case of *Willcox v. Consolidated Gas Co.*,¹⁷⁸ in which the opinion was by the author of the opinion in the mileage book case and in which it was held that a gas company may be required to sell gas to a particular wholesale customer at a lower rate than is charged to the general public.¹⁷⁹

¹⁷⁶ See sec. 95, *supra*.

¹⁷⁷ With the comments of the court in 173 U. S. at 693, 19 Sup. Ct. at 569, 43 L. ed. at 863, on fixing period within which tickets should be usable, see also *Lochner v. New York* (1905) 198 U. S. 45, 62, 25 Sup. Ct. 539, 545, 49 L. ed. 937; but compare criticism in Freund, *Limitations of Hours of Labor*, 17 Green Bag, 411, 415; and decisions in *Bacon v. Walker* (1907) 204 U. S. 311, 317, 27 Sup. Ct. 289, 291, 51 L. ed. 499, *Hatch v. Reardon* (1907) 204 U. S. 152, 159, 27 Sup. Ct. 188, 190; and also *Southwestern Oil Co. v. Texas* (1910) 217 U. S. 114, 126, 30 Sup. Ct. 496, 500, 54 L. ed. 688.

¹⁷⁸ (1912) 212 U. S. 19, 54, 29 Sup. Ct. 192, 200, 201, 53 L. ed. 382; see note 161, *supra*.

¹⁷⁹ Compare also note in 14 Harv. L. Rev. at 143; *Interstate Com. Comm. v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946; the language of Holmes and Harlan, JJ., in *Interstate C. S. Ry. Co. v. Commonwealth* (1907) 207 U. S. 79, 28 Sup. Ct. 26, 52 L. ed. 111, affirming *Commonwealth v. Interstate C. S. Ry. Co.* (1905) 187 Mass. 436, 73 N. E. 530, 11 L. R. A. N. S. 973; and *Fitzmaurice v. New Y., N. H. & H. R. Co.* (1906) 192 Mass. 159, 78 N. E. 418, 6 L. R. A. N. S. 1146; *Puget S. E. Ry. v. Railroad Comm.* (1911) 65 Wash. 75, 117 Pac. 739; *Interstate Com. Comm. v. Baltimore & O. R. Co.* (1892) 145 U. S. 263, 276, 12 Sup. Ct. 844, 848, 36 L. ed. 699; *Whiting, Commutation Tickets and Rate Regulation*, 8 Col. L. Rev. 636; Freund, *Police Power*, pp. 406, 407, 410, note; Judson, *Interstate Commerce*, 2d ed., sec. 203; and cases cited in Wyman, *Public Service Corporations*, p. 950.

CHAPTER VII.

THE IMPAIRMENT OF CONTRACTS.

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INTRODUCTORY.

The clause stated.

188. The Constitution in Article I, section 10, declares that "No state shall pass any law impairing the obligation of contracts."

"LAWS" FORBIDDEN.

In general.

189. The provision obviously does not relate to federal legislation.¹ We have already ² noted cases in which the

¹ Philadelphia, B. & W. R. Co. v. Schubert (1912) 224 U. S. 603, 613,

Interstate Commerce Act had impaired the obligation of contracts between railroads and their patrons and in which the Act was enforced by the Supreme Court. But the provision does forbid the states by law to deprive parties of the legal right of enforcing their contracts or obtaining compensation for breaches thereof. This is true whether the law-making is by means of the state constitution,³ or an act of the legislature,⁴ or an act of an administrative authority of the state to which power has been delegated by the legislature,⁵ or an act of a municipality⁶ or other extrinsic authority⁷ to which the state

614, 32 Sup. Ct. 589, 592, 56 L. ed. 911; *Hanover Nat. Bank v. Moyses* (1902) 186 U. S. 181, 188, 22 Sup. Ct. 857, 860, 46 L. ed. 1113; *Sturges v. Crowninshield* (1819) 4 Wheat. 122, 194, 4 L. ed. 529. See also sec. 53, *supra*; note 2 in Chapter 5, *supra*.

² Sec. 18, *supra*.

³ *Houston & T. C. Ry. Co. v. Texas* (1898) 170 U. S. 243, 18 Sup. Ct. 610, 42 L. ed. 1023; *Fisk v. Jefferson Police Jury* (1885) 116 U. S. 131, 6 Sup. Ct. 329, 29 L. ed. 587; *New O. G. Co. v. Louisiana L. Co.* (1885) 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516; *Keith v. Clark* (1878) 97 U. S. 454, 24 L. ed. 1071; *Edwards v. Kearzey* (1877) 96 U. S. 595, 24 L. ed. 793; *Pacific R. Co. v. Maguire* (1873) 20 Wall. 36, 22 L. ed. 282; *Gunn v. Barry* (1872) 15 Wall. 610, 21 L. ed. 212; *Delmas v. Insurance Co.* (1871) 14 Wall. 661, 20 L. ed. 757; *White v. Hart* (1871) 13 Wall. 646, 20 L. ed. 685; see also *County of Moultrie v. Rockingham T. C. S. Bank* (1875) 92 U. S. 631, 23 L. ed. 631; *Railroad Co. v. McClure* (1870) 10 Wall. 511, 515, 19 L. ed. 997; *Dodge v. Woolsey* (1855) 18 How. 331, 15 L. ed. 401.

⁴ See, e. g., *Louisiana v. New Orleans* (1909) 215 U. S. 170, 30 Sup. Ct. 40, 54 L. ed. 144; *American S. & R. Co. v. Colorado* (1907) 204 U. S. 103, 27 Sup. Ct. 198, 51 L. ed. 393; *Dartmouth College v. Woodward* (1819) 4 Wheat. 518, 4 L. ed. 629; *Terrett v. Taylor* (1815) 9 Cranch, 43, 3 L. ed. 650; *Fletcher v. Peck* (1810) 6 Cranch, 87, 3 L. ed. 162.

⁵ See *Grand T. W. Ry. Co. v. Railroad Comn. of Indiana* (1911) 221 U. S. 400, 403, 31 Sup. Ct. 537, 55 L. ed. 786, and cases there cited.

⁶ *Boise A. H. & C. W. Co. v. Boise City* (1913) 230 U. S. 84, 33 Sup. Ct. 997, 57 L. ed. 1400; *Owensboro v. Cumberland T. & T. Co.* (1913) 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389; *Grand T. W. Ry. Co. v. South Bend* (1913) 227 U. S. 544, 33 Sup. Ct. 303, 57 L. ed. 633; *Louisville v. Cumberland T. & T. Co.* (1912) 224 U. S. 649, 32 Sup. Ct. 572, 56 L. ed. 934; *Minneapolis v. Minneapolis S. Ry. Co.* (1910) 215 U. S. 417, 30 Sup. Ct. 118, 54 L. ed. 259; *Vicksburg v. Vicksburg W. Co.* (1906) 202 U. S. 453, 26

by its enforcement gives the force of a law. It must be noted, however, that a "law" to violate the provision must have been enacted after the making of the contract.⁸

Sup. Ct. 660, 50 L. ed. 1102; *Cleveland v. Cleveland E. Ry. Co.* (1906) 201 U. S. 529, 26 Sup. Ct. 513, 50 L. ed. 854; *Cleveland v. Cleveland C. Ry. Co.* (1904) 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102; *Detroit v. Detroit C. S. Ry. Co.* (1902) 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592; *Los Angeles v. Los Angeles C. W. Co.* (1900) 177 U. S. 558, 20 Sup. Ct. 736, 44 L. ed. 886; *Walla Walla v. Walla Walla W. Co.* (1898) 172 U. S. 1, 19 Sup. Ct. 77, 43 L. ed. 341; *Cumberland T. & T. Co. v. Memphis* (1912) 198 Fed. 955. See also *Northern P. Ry. Co. v. Duluth* (1908) 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed. 630; *Mercantile T. & D. Co. v. Columbus* (1906) 203 U. S. 311, 321, 27 Sup. Ct. 83, 85, 51 L. ed. 198; *St. Paul G. L. Co. v. St. Paul* (1901) 181 U. S. 142, 21 Sup. Ct. 575, 45 L. ed. 788; *City Ry. Co. v. Citizens' S. Ry. Co.* (1897) 166 U. S. 557, 17 Sup. Ct. 653, 41 L. ed. 1114; *Home T. & T. Co. v. Los Angeles* (1913) 227 U. S. 278, 33 Sup. Ct. 312, 57 L. ed. 510; *Portland Ry., L. & P. Co. v. Portland* (1912) 201 Fed. 119. Compare *Des Moines v. Des Moines C. Ry. Co.* (1909) 214 U. S. 179, 29 Sup. Ct. 553, 53 L. ed. 958. A simple breach of a contract by a municipality which is not based on legislation does not amount to an act impairing the obligation of the contract: *Shawnee S. & D. Co. v. Stearns* (1911) 220 U. S. 462, 31 Sup. Ct. 452, 55 L. ed. 544; *Dawson v. Columbia A. S. F., S. D., T. & T. Co.* (1905) 197 U. S. 178, 25 Sup. Ct. 420, 49 L. ed. 713. See also *Hamilton G. L. & C. Co. v. Hamilton City* (1892) 146 U. S. 258, 266, 13 Sup. Ct. 90, 92, 36 L. ed. 963.

⁷ *Stevens v. Griffith* (1884) 111 U. S. 48, 4 Sup. Ct. 283, 28 L. ed. 348. See also *Ford v. Surget* (1878) 97 U. S. 594, 24 L. ed. 1018; *Williams v. Bruffy* (1877) 96 U. S. 176, 24 L. ed. 716.

⁸ *Chicago, B. & Q. R. Co. v. Cram* (1913) 228 U. S. 70, 85, 33 Sup. Ct. 437, 440, 57 L. ed. 734; *Abilene Nat. Bk. v. Dolley* (1913) 228 U. S. 1, 5, 33 Sup. Ct. 409, 410, 57 L. ed. 707; *National M. B. & L. Assn. v. Braham* (1904) 193 U. S. 635, 647, 24 Sup. Ct. 532, 535, 48 L. ed. 823; *Oshkosh W. Co. v. Oshkosh* (1903) 187 U. S. 437, 446, 23 Sup. Ct. 234, 237, 47 L. ed. 249; *New O. W. Co. v. Louisiana* (1902) 185 U. S. 336, 350, 352, 22 Sup. Ct. 691, 696, 697, 46 L. ed. 936; *Pinney v. Nelson* (1901) 183 U. S. 144, 147, 22 Sup. Ct. 52, 54, 46 L. ed. 125; *Bier v. McGehee* (1893) 148 U. S. 137, 140, 13 Sup. Ct. 580, 581, 37 L. ed. 397; *Brown v. Smart* (1892) 145 U. S. 454, 458, 12 Sup. Ct. 958, 959, 36 L. ed. 773; *Denny v. Bennett* (1888) 128 U. S. 489, 9 Sup. Ct. 134, 32 L. ed. 491; *Lehigh W. Co. v. Easton* (1887) 121 U. S. 388, 391, 7 Sup. Ct. 916, 918, 30 L. ed. 1059. See also *Shawnee S. & D. Co. v. Stearns* (1911) 220 U. S. 462, 471, 31 Sup. Ct. 452, 455, 55 L. ed. 544; *San Antonio T. Co. v. Altgelt* (1906) 200 U. S. 304, 26 Sup. Ct. 261, 50 L. ed. 491; *Blackstone v. Miller* (1903) 188 U. S. 189, 207, 23 Sup. Ct. 277, 279, 47 L. ed. 439; *Hanford v. Davies* (1896) 163 U. S. 273, 278, 16

Rule as to judicial decisions.

190. An erroneous decision by a state court as to the existence or the validity of a contract does not in itself amount to a law impairing its obligation.⁹ The decision will not be reviewed by the Supreme Court unless it is claimed that the state has impaired the obligation of the contract by some law.¹⁰ In that case the Supreme Court will re-examine a decision by the state court that the law

Sup. Ct. 1051, 1053, 41 L. ed. 157; *Planters' I. Co. v. Tennessee* (1896) 161 U. S. 193, 16 Sup. Ct. 466, 40 L. ed. 667; *Denver v. New York T. Co.* (1913) 229 U. S. 123, 33 Sup. Ct. 657, 57 L. ed. 1101; *Ettor v. Tacoma* (1913) 228 U. S. 148, 33 Sup. Ct. 428, 57 L. ed. 773.

⁹ As was said in *Cross L. S. & F. Club v. Louisiana* (1912) 224 U. S. 632, 638-639, 32 Sup. Ct. 577, 579-580, 56 L. ed. 924, "This clause, as its terms disclose, is not directed against all impairment of contract obligations, but only against such as results from a subsequent exertion of the legislative power of the state. It does not reach mere errors committed by a state court when passing upon the validity or effect of a contract under the laws in existence when it was made. And so, while such errors may operate to impair the obligation of the contract, they do not give rise to a federal question. But when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a federal question is presented. In such a case it becomes our duty to take jurisdiction and to determine the existence and validity of the contract, what obligations arose from it, and whether they are impaired by the subsequent law. But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that that court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired." See also the cases cited there and in *Patterson, The United States and the States Under the Constitution*, 2d ed., p. 140; *Mobile, J. & K. C. R. Co. v. Mississippi* (1908) 210 U. S. 187, 205, 28 Sup. Ct. 650, 656, 657, 52 L. ed. 1016.

¹⁰ Willoughby on the Constitution, p. 917, points out that "The Supreme Court has shown a strong disposition to find, when possible, an impairing statute, and thus to justify its appellate jurisdiction for the protection of contracts in cases originating in state courts." See also Dodd, *Impairment of the Obligation of Contract by State Judicial Decisions*, 4 Ill. L. Rev. 155, 327, 332.

has not impaired the contract or that there has been no contract to be impaired.¹¹

Where, however, a state court construes a state statute that construction becomes, as to contract rights acquired under it, as much a part of the statute as the text itself, and in cases arising in federal courts those courts will refuse to recognize the validity of any subsequent retroactive change of that statute by construction.¹² But in cases arising in state courts the Supreme Court will not on writ of error decide whether the state court has or has not interpreted the state law in accordance with previous interpretations by the state court.¹³

¹¹ *Grand T. W. Ry. Co. v. South Bend* (1913) 227 U. S. 544, 33 Sup. Ct. 303, 57 L. ed. 633; *Kier v. Lowrey* (1905) 199 U. S. 233, 26 Sup. Ct. 27, 50 L. ed. 167; *McCullough v. Virginia* (1898) 172 U. S. 102, 19 Sup. Ct. 134, 43 L. ed. 382; *Mobile & O. R. Co. v. Tennessee* (1894) 153 U. S. 486, 14 Sup. Ct. 986, 38 L. ed. 793; *Jefferson Branch Bank v. Skelly* (1861) 1 Black, 436, 17 L. ed. 173; *State Bank v. Knopp* (1853) 16 How. 369, 14 L. ed. 977; *Louisiana ex rel. Hubert v. New Orleans* (1909) 215 U. S. 170, 30 Sup. Ct. 40, 54 L. ed. 144; *Muhlker v. New Y. & H. R. Co.* (1905) 197 U. S. 544, 570, 25 Sup. Ct. 522, 528, 49 L. ed. 872. See also *J. W. Perry Co. v. Norfolk* (1911) 220 U. S. 472, 31 Sup. Ct. 465, 55 L. ed. 548; *Northern P. Ry. Co. v. Duluth* (1908) 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed. 630; *Sullivan v. Texas* (1908) 207 U. S. 416, 28 Sup. Ct. 215, 52 L. ed. 274; *Wilson v. Standefer* (1902) 184 U. S. 399, 22 Sup. Ct. 384, 46 L. ed. 612; and cases cited in *Patterson, The United States and the States Under the Constitution*, 2d ed., p. 141.

¹² *Wilkes County v. Coler* (1901) 180 U. S. 506, 21 Sup. Ct. 458, 45 L. ed. 642; *Loeb v. Columbia Township Trustees* (1900) 179 U. S. 472, 492, 21 Sup. Ct. 174, 182, 45 L. ed. 280; *Douglass v. County of Pike* (1879) 101 U. S. 677, 25 L. ed. 968; *City v. Lamson* (1869) 9 Wall. 477, 19 L. ed. 725; *Chicago v. Sheldon* (1869) 9 Wall. 50, 19 L. ed. 594; *Gelpcke v. Dubuque* (1863) 1 Wall. 175, 206, 17 L. ed. 520. See also *Kuhn v. Fairmount C. Co.* (1910) 215 U. S. 349, 30 Sup. Ct. 140, 54 L. ed. 228; *Havemeyer v. Iowa County* (1865) 3 Wall. 294, 303, 18 L. ed. 38. The principles involved in the above cases are discussed in *Dodd, Impairment of the Obligation of Contract by State Judicial Decisions*, 4 Ill. L. Rev. 155, 327, where a bibliography on the subject is given on p. 155; *Willoughby on the Constitution*, p. 920 et seq.; *White, Some Recent Criticisms of Gelpcke v. Dubuque*, 38 Am. L. Reg. N. S. 473, 529, 593, 657; 16 L. R. A. 646.

¹³ *National M. B. & L. Assn. v. Brahan* (1904) 193 U. S. 635, 647, 24

CONTRACTS PROTECTED.

191. The provision which we are considering protects against impairment of obligation both executory ¹⁴ and executed ¹⁵ contracts. It protects not only contracts between private individuals but also contracts to which one

Sup. Ct. 532, 535, 48 L. ed. 823; *Bacon v. Texas* (1896) 163 U. S. 207, 220-222, 16 Sup. Ct. 1023, 1028-1029, 41 L. ed. 132. See also *Cross L. S. & F. Club v. Louisiana* (1912) 224 U. S. 632, 639, 32 Sup. Ct. 577, 580, 56 L. ed. 924; *Central L. Co. v. Laidley* (1895) 159 U. S. 103, 111, 112, 16 Sup. Ct. 80, 82, 40 L. ed. 91; *Dodd, Impairment of the Obligation of Contract by State Judicial Decisions*, 4 Ill. L. Rev. 155, 327; *White, Some Recent Criticisms of Gelpcke v. Dubuque*, 38 Am. L. Reg. N. S. 473, 529, 593, 657, especially at 660 et seq.; *Willoughby on the Constitution*, p. 916 et seq.; *Crigler v. Shepler* (1909) 79 Kan. 834, 101 Pac. 619, 23 L. R. A. N. S. 500, and note in 23 L. R. A. N. S.

¹⁴ E. g., cases in note 6, supra; and *Louisiana v. New Orleans* (1909) 215 U. S. 170, 30 Sup. Ct. 40, 54 L. ed. 144; *New O. G. Co. v. Louisiana L. Co.* (1885) 115 U. S. 650, 6 Sup. Ct. 252, 29 L. ed. 516; *Edwards v. Kearzey* (1877) 96 U. S. 595, 24 L. ed. 793; *County of Moultrie v. Rockingham T. C. S. Bank* (1875) 92 U. S. 631, 23 L. ed. 631; *State Tax on Foreign-held Bonds* (1872) 15 Wall. 300, 21 L. ed. 179; *Delmas v. Insurance Co.* (1871) 14 Wall. 661, 20 L. ed. 757; *Ogden v. Saunders* (1827) 12 Wheat. 213, 6 L. ed. 606; *McMillan v. McNeill* (1819) 4 Wheat. 209, 4 L. ed. 552; *Sturges v. Crowninshield* (1819) 4 Wheat. 122, 4 L. ed. 529.

¹⁵ E. g., *Houston & T. C. Ry. Co. v. Texas* (1898) 170 U. S. 243, 18 Sup. Ct. 610, 42 L. ed. 1023; *Mobile v. Watson* (1886) 116 U. S. 289, 6 Sup. Ct. 398, 29 L. ed. 620; *Louisiana v. Police Jury* (1884) 111 U. S. 716, 4 Sup. Ct. 648, 28 L. ed. 574; *Ralls County Court v. United States* (1881) 105 U. S. 733, 26 L. ed. 1220; *Louisiana v. Pilsbury* (1881) 105 U. S. 278, 26 L. ed. 1090; *Wolff v. New Orleans* (1880) 103 U. S. 358, 26 L. ed. 395; *Memphis v. United States* (1877) 97 U. S. 293, 24 L. ed. 920; *Blount v. Windley* (1877) 95 U. S. 173, 24 L. ed. 424; *Davis v. Gray* (1872) 16 Wall. 203, 21 L. ed. 447; *Terrett v. Taylor* (1815) 9 Cranch, 43, 3 L. ed. 650; *Fletcher v. Peck* (1810) 6 Cranch, 87, 3 L. ed. 162.

¹⁶ *American S. & R. Co. v. Colorado* (1907) 204 U. S. 103, 27 Sup. Ct. 198, 51 L. ed. 393; *McCullough v. Virginia* (1898) 172 U. S. 102, 19 Sup. Ct. 134, 43 L. ed. 382; *Mobile & O. R. Co. v. Tennessee* (1894) 153 U. S. 486, 14 Sup. Ct. 986, 38 L. ed. 793; *McGahey v. Virginia* (1890) 135 U. S. 682, 10 Sup. Ct. 972, 34 L. ed. 304; *Poindexter v. Greenhow* (1885) 114 U. S. 270, 5 Sup. Ct. 903, 29 L. ed. 185; *Hall v. Wisconsin* (1880) 103 U. S. 5, 26 L. ed. 302; *Green v. Biddle* (1823) 8 Wheat. 1, 5 L. ed. 547; *Dartmouth College v. Woodward* (1819) 4 Wheat. 518, 4 L. ed. 629; *Terrett v. Taylor* (1815) 9 Cranch, 43, 3 L. ed. 650; *New Jersey v. Wilson* (1812)

of the parties is the state itself ¹⁶ or some local government acting under authority from the state.¹⁷

INTERPRETATION OF CONTRACTS.

Contractual limitations upon governmental power over rates.

192. It is clearly established that some exemptions from rate regulation may be secured by a public service corporation by contract with the state or with a local government which has received from the state authority to enter into such a contract. A number of such contracts, made in express terms, have been sustained and enforced by the Supreme Court.¹⁸ For instance, where, under a

7 Cranch, 164, 3 L. ed. 303; *Fletcher v. Peck* (1810) 6 Cranch, 87, 3 L. ed. 162; *Woodruff v. Trapnall* (1850) 10 How. 190, 207, 13 L. ed. 383.

¹⁷ See cases in note 6, *supra*, 18, *infra*; and *Scotland County Court v. United States* (1891) 140 U. S. 41, 11 Sup. Ct. 697, 35 L. ed. 363; *Seibert v. Lewis* (1887) 122 U. S. 284, 7 Sup. Ct. 1190, 30 L. ed. 1161; *Mobile v. Watson* (1886) 116 U. S. 289, 6 Sup. Ct. 398, 29 L. ed. 620; *Fiak v. Jefferson Police Jury* (1885) 116 U. S. 131, 6 Sup. Ct. 329, 29 L. ed. 587; *Louisiana v. Police Jury* (1884) 111 U. S. 716, 4 Sup. Ct. 648, 28 L. ed. 574; *Ralls County Court v. United States* (1881) 105 U. S. 733, 26 L. ed. 1220; *Louisiana v. Pilsbury* (1881) 105 U. S. 278, 26 L. ed. 1090; *Wolff v. New Orleans* (1880) 103 U. S. 358, 26 L. ed. 395; *Memphis v. United States* (1877) 97 U. S. 293, 24 L. ed. 920; *Murray v. Charleston* (1877) 96 U. S. 432, 24 L. ed. 760; *County of Moultrie v. Rockingham T. C. S. Bank* (1875) 92 U. S. 631, 23 L. ed. 631.

¹⁸ *Minneapolis v. Minneapolis S. Ry. Co.* (1910) 215 U. S. 417, 30 Sup. Ct. 118, 54 L. ed. 259; *Vicksburg v. Vicksburg W. Co.* (1907) 206 U. S. 496, 27 Sup. Ct. 762, 51 L. ed. 1155; *Cleveland v. Cleveland E. Ry. Co.* (1906) 201 U. S. 529, 26 Sup. Ct. 513, 50 L. ed. 854; *Cleveland v. Cleveland C. Ry. Co.* (1904) 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102; *Cleveland v. Cleveland E. Ry. Co.* (1904) 194 U. S. 538, 24 Sup. Ct. 764, 48 L. ed. 1109; *Detroit v. Detroit C. S. Ry. Co.* (1902) 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592; *Los Angeles v. Los Angeles C. W. Co.* (1900) 177 U. S. 558, 20 Sup. Ct. 736, 44 L. ed. 886. See also *Owensboro v. Cumberland T. & T. Co.* (1913) 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389; *Boise A. H. & C. W. Co. v. Boise City* (1913) 230 U. S. 84, 33 Sup. Ct. 997, 57 L. ed. 1400; *Grand T. W. Ry. Co. v. South Bend* (1913) 227 U. S. 544, 33 Sup. Ct. 303,

statute expressly directing that street railway fares should be fixed by agreement between the city and the company, an ordinance provided that the fares should not exceed five cents, the court held that the city could not afterwards impose a lower fare, although it had reserved the right to make further rules, ordinances and regulations, and that a constitutional reservation to the legislature of the power to alter, amend or repeal its contracts did not grant such power to the city.¹⁹ And where a city leased its water works in consideration of a fixed rental and the furnishing of water for public uses without charge, reserving to itself the right to regulate water rates, with the proviso that they should not be reduced below those then charged by the lessees, a subsequent ordinance further reducing the rates was declared invalid.²⁰

57 L. ed. 633; *Gulf & S. I. R. Co. v. Adams* (1907) 90 Miss. 559, 45 So. 91; *Omaha W. Co. v. Omaha* (1906) 147 Fed. 1, 12 L. R. A. N. S. 736; note in 23 Harv. L. Rev. 388.

¹⁹ *Detroit v. Detroit C. S. Ry. Co.* (1902) 184 U. S. 368, 22 Sup. Ct. 410, 46 L. ed. 592.

²⁰ *Los Angeles v. Los Angeles C. W. Co.* (1900) 177 U. S. 558, 20 Sup. Ct. 736, 44 L. ed. 886.—And it has been held by state courts that where a state had granted to a railway company the right to regulate its charges until a date named, it could not before that date prohibit the company from making a greater charge for a shorter than for a longer haul which included the shorter route: *Sloan v. Pacific R.* (1875) 61 Mo. 24; and that where a state had granted to a railway company the right to regulate its charges "subject only" to a specified limitation, then, although other sections of the same act provided that the company should charge such sums as should be "lawfully" established, and that the regulations of the company should not be contrary to the laws of the state, that state could not afterwards impose further limitations upon the rates charged: *Pingree v. Michigan C. R. Co.* (1898) 118 Mich. 314, 76 N. W. 635, 53 L. R. A. 274. See also note in 21 A. & E. R. Cas. 50; *Rushville v. Rushville N. G. Co.* (1905) 164 Ind. 162, 73 N. E. 87; *Mississippi R. Comn. v. Gulf & S. I. R. Co.* (1901) 79 Miss. 750, 29 So. 789. To the contrary are *Laurel F. & S. H. R. Co. v. West V. T. Co.* (1884) 25 W. Va. 324; *West V. T. Co. v. Sweetzer* (1885) 25 W. Va. 434; and see *Stanislaus County v. San J. & K. R. C. & I. Co.* (1904) 192 U. S. 201, 24 Sup. Ct. 241, 48 L. ed. 406; *Owensboro v. Owensboro W. Co.* (1903) 191 U. S. 358, 24 Sup. Ct. 82, 48 L. ed. 217;

Governmental power not limited by mere implication.

193. But a claim that a state or a local government has bound itself by contract not to reduce the rates charged by a public service corporation will be closely scrutinized by the courts and its validity will not be recognized unless it is clearly proved. All doubts will be resolved in favor of the continuance of power in the government.²¹ The authority of the state or local government over rates is not surrendered by mere implication. In chartering a company the state does not enter into an implied contract that it will not place any limitations upon the rates

Ruggles v. Illinois (1883) 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 812; language of court in *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 518, 22 Sup. Ct. 95, 101, 46 L. ed. 298; and sec. 193, *infra*.

²¹ *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 273, 29 Sup. Ct. 50, 52, 53 L. ed. 176, citing *Metropolitan S. Ry. Co. v. New York* (1905) 199 U. S. 1, 25 Sup. Ct. 705, 50 L. ed. 65; *Stanislaus County v. San J. & K. R. C. & I. Co.* (1904) 192 U. S. 201, 211, 24 Sup. Ct. 241, 245, 48 L. ed. 406; *Freeport W. Co. v. Freeport* (1901) 180 U. S. 587, 599, 611, 21 Sup. Ct. 493, 498, 502, 45 L. ed. 679; *Vicksburg, S. & P. R. Co. v. Dennis* (1886) 116 U. S. 665, 6 Sup. Ct. 625, 29 L. ed. 770; *Railroad Comn. Cases—Stone v. Farmers' L. & T. Co.* (1886) 116 U. S. 307, 325, 6 Sup. Ct. 334, 388, 1191, 342, 29 L. ed. 636; *Providence Bank v. Billings* (1830) 4 Pet. 514, 561, 7 L. ed. 939; and see *Water, L. & G. Co. v. Hutchinson* (1907) 207 U. S. 385, 28 Sup. Ct. 135, 52 L. ed. 257. The court might have cited also *Owensboro W. Co. v. Owensboro* (1903) 191 U. S. 358, 24 Sup. Ct. 82, 48 L. ed. 217; *Knoxville W. Co. v. Knoxville* (1903) 189 U. S. 434, 436, 23 Sup. Ct. 531, 532, 47 L. ed. 887; *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 517, 22 Sup. Ct. 95, 101, 46 L. ed. 298; *Rogers P. W. Co. v. Fergus* (1901) 180 U. S. 624, 21 Sup. Ct. 490, 45 L. ed. 702; and cases cited in the remainder of this section, which deal with rates. And see *Cedar R. G. L. Co. v. Cedar Rapids* (1912) 223 U. S. 655, 667, 668, 32 Sup. Ct. 389, 390, 56 L. ed. 594, and the following cases which, while they do not deal with rates directly, support the same proposition: *Detroit U. Ry. v. Detroit* (1913) 229 U. S. 39, 33 Sup. Ct. 697, 57 L. ed. 1056; *Berryman v. Whitman College* (1912) 222 U. S. 334, 32 Sup. Ct. 147, 56 L. ed. 225; *J. W. Perry Co. v. Norfolk* (1911) 220 U. S. 472, 480, 31 Sup. Ct. 465, 468, 55 L. ed. 548; *St. Louis v. United Rys. Co.* (1908) 210 U. S. 266, 28 Sup. Ct. 630, 52 L. ed. 1054; *Blair v. Chicago* (1906) 201 U. S. 400, 26 Sup. Ct. 427, 50 L. ed. 801; *Pearsall v. Great N. Ry. Co.* (1896) 161 U. S. 646, 16 Sup. Ct. 705, 40 L. ed. 838.

to be charged by that company.²² Even where the charter in general terms authorizes the company to regulate the rates, the state may subsequently vest in a commission the power to limit those rates;²³ where a charter vests that power in a commission of which some members are to be appointed by the company, the legislature may nevertheless itself place limitations upon the charges;²⁴ and it has been said, although, in view of the facts of the case, it was not decided, that where a water

²² *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 517, 518, 22 Sup. Ct. 95, 101, 46 L. ed. 298; *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. ed. 970; *Georgia R. & B. Co. v. Smith* (1888) 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377; *Ruggles v. Illinois* (1883) 108 U. S. 526, 2 Sup. Ct. 832, 27 L. ed. 812; *Illinois C. R. Co. v. Illinois* (1883) 108 U. S. 541, 2 Sup. Ct. 839, 27 L. ed. 818; *Chicago, B. & Q. R. Co. v. Iowa* (1876) 94 U. S. 155, 24 L. ed. 94. See also *Pearsall v. Great N. Ry. Co.* (1896) 161 U. S. 646, 16 Sup. Ct. 705, 40 L. ed. 838; *Pennsylvania R. Co. v. Miller* (1889) 132 U. S. 75, 84, 10 Sup. Ct. 34, 37, 33 L. ed. 267.—In *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 393, 14 Sup. Ct. 1047, 1052, 38 L. ed. 1014, the court suggested that the mere chartering of a railroad company by a state of itself created an implied contract which limited to some extent the power of the state over the rates which might be charged by the railroad. The thought suggested in that case, however, has not been developed in later cases, and as the implied contract, if any, would not secure to the railroad any greater protection than that which the court has declared to be secured to the railroad by other provisions of the Constitution upon which a number of decisions have been based, that supposed implied contract in the charter may be safely ignored. With *Reagan v. Farmers' L. & T. Co.* see *Cleveland G. & C. Co. v. Cleveland* (1891) 71 Fed. 610; *Rushville v. Rushville N. G. Co.* (1905) 164 Ind. 162, 73 N. E. 87; *Capital C. G. Co. v. Des Moines* (1896) 72 Fed. 829.

²³ *Southern P. Co. v. Campbell* (1913) 230 U. S. 537, 33 Sup. Ct. 1027, 57 L. ed. 1610; *Stone v. Farmers' L. & T. Co.* (1886) 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. ed. 636; *Stone v. Illinois C. R. Co.* (1886) 116 U. S. 347, 6 Sup. Ct. 348, 388, 1191, 29 L. ed. 650; *Georgia R. & B. Co. v. Smith* (1888) 128 U. S. 174, 9 Sup. Ct. 47, 32 L. ed. 377; *Chicago, M. & St. P. Ry. Co. v. Minnesota* (1890) 134 U. S. 418, 10 Sup. Ct. 462, 33 L. ed. 970; *Owensboro v. Owensboro W. Co.* (1904) 191 U. S. 358, 24 Sup. Ct. 82, 48 L. ed. 217, and cases there cited. Compare note 20, *supra*.

²⁴ *Spring V. W. W. v. Schottler* (1884) 110 U. S. 347, 4 Sup. Ct. 48, 28 L. ed. 173; *Spring V. W. W. v. Bartlett* (1883) 16 Fed. 615.

company was organized under a statute providing that the commissioners should not reduce the rates below a stated limit, the state may authorize the commissioners to reduce the rates below that limit.²⁵

Parties exempted.

194. Moreover, even an express grant of exemption from regulation does not by implication extend to a purchaser²⁶ or a lessee²⁷ from the grantee. And the court has held in the case of a gas company that a purchasing company which was exempt from rate regulation had not

²⁵ *Stanislaus County v. San J. & K. R. C. & I. Co.* (1904) 192 U. S. 201, 24 Sup. Ct. 241, 48 L. ed. 406. The state constitution had reserved to the legislature the power to amend or repeal the statute involved. See also *Winchester & L. T. R. Co. v. Croxton* (1896) 98 Ky. 739, 34 S. W. 518, 33 L. R. A. 177; *Houston & T. C. R. Co. v. Storey* (1906) 149 Fed. 499.

²⁶ *Norfolk & W. R. Co. v. Pendleton* (1895) 156 U. S. 667, 15 Sup. Ct. 413, 39 L. ed. 574; *St. Louis & S. F. Ry. Co. v. Gill* (1895) 156 U. S. 649, 15 Sup. Ct. 484, 39 L. ed. 567; *Grand R. & I. Ry. Co. v. Osborn* (1904) 193 U. S. 17, 24 Sup. Ct. 310, 48 L. ed. 598; *Shields v. Ohio* (1877) 95 U. S. 319, 24 L. ed. 357; *Chicago G. W. Ry. Co. v. Minnesota* (1910) 216 U. S. 234, 30 Sup. Ct. 353, 54 L. ed. 460; *Wright v. Georgia R. & B. Co.* (1910) 216 U. S. 420, 30 Sup. Ct. 242, 54 L. ed. 544; *Yazoo & M. V. R. Co. v. Vicksburg* (1908) 209 U. S. 358, 28 Sup. Ct. 510, 52 L. ed. 833; *Rochester Ry. Co. v. Rochester* (1907) 205 U. S. 236, 27 Sup. Ct. 469, 51 L. ed. 784. See also *San Antonio T. Co. v. Altgelt* (1906) 200 U. S. 304, 26 Sup. Ct. 261, 50 L. ed. 491; *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560; *Snell v. Chicago* (1890) 133 Ill. 413, 24 N. E. 532, 8 L. R. A. 858; *Matthews v. Board of Corp. Comrs.* (1899) 97 Fed. 400. In *Louisville v. Cumberland T. & T. Co.* (1912) 224 U. S. 649, 32 Sup. Ct. 572, 56 L. ed. 934, and *Minneapolis v. Minneapolis S. Ry. Co.* (1910) 215 U. S. 417, 30 Sup. Ct. 118, 54 L. ed. 259, there were questions of estoppel of the municipality. Compare *Owensboro v. Cumberland T. & T. Co.* (1913) 230 U. S. 58, 33 Sup. Ct. 982, 57 L. ed. 1389; *Seaboard A. L. Ry. Co. v. Railroad Comn.* (1907) 155 Fed. 792; *Ball v. Rutland R. Co.* (1899) 93 Fed. 513.

²⁷ See *Jetson v. University of the South* (1908) 208 U. S. 489, 28 Sup. Ct. 375, 52 L. ed. 584; *Chicago U. T. Co. v. Chicago* (1902) 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

secured exemption as to property which it had acquired from a company which was not exempt.²⁸

LIMITATIONS UPON POWER TO CONTRACT.

In general.

195. Of course, the provision of the Constitution which we are considering does not apply if the parties to a contract are without power to make a binding contract, as would be the case if the state legislature were forbidden by the state constitution to make such a contract as to rates²⁹ or if a municipality had not received from the state authority to enter into such a contract;³⁰ and the provision would not apply if the contract were for other special reasons subject to subsequent state legislation which might destroy its force.³¹ Such cases we shall now consider, noting first the points on which the law is most clearly settled.

Contract with municipalities.

196. A municipality cannot by contract bind itself not to regulate rates unless the power so to bind itself has been clearly granted to the municipality. In some cases

²⁸ *People's G. & C. Co. v. Chicago* (1904) 194 U. S. 1, 24 Sup. Ct. 520, 48 L. ed. 851.

²⁹ See *Gulf & S. I. R. Co. v. Hewes* (1901) 183 U. S. 66, 22 Sup. Ct. 26, 46 L. ed. 86; *Planters' I. Co. v. Tennessee* (1896) 161 U. S. 193, 16 Sup. Ct. 466, 40 L. ed. 667; *Keokuk & W. R. Co. v. Missouri* (1894) 152 U. S. 301, 14 Sup. Ct. 592, 38 L. ed. 450; *Bier v. McGehee* (1893) 148 U. S. 137, 13 Sup. Ct. 580, 37 L. ed. 397; *Lake County v. Graham* (1889) 130 U. S. 674, 9 Sup. Ct. 654, 32 L. ed. 1065; *Railroad Companies v. Gaines* (1878) 97 U. S. 697, 24 L. ed. 1091; *Shields v. Ohio* (1877) 95 U. S. 319, 24 L. ed. 357; *Morgan v. Louisiana* (1876) 93 U. S. 217, 23 L. ed. 860; *Trask v. Maguire* (1873) 18 Wall. 391, 21 L. ed. 938; and cases cited in *Patterson, The United States and the States Under the Constitution*, 2d ed., p. 148.

³⁰ See sec. 196, *infra*.

³¹ See secs. 197-199, *infra*.

exemptions from regulation have been secured by contract and have been sustained against later ordinances by which the municipalities have attempted to impair the obligation of those contracts.³² But in other cases where it has been claimed that municipalities had by ordinance limited their power over the charges of public service companies³³ the court has decided that the municipalities involved had not received from the state the power to bind themselves by contract not to regulate those rates.³⁴

³² See note 18, *supra*.

³³ *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 273, 29 Sup. Ct. 50, 52, 53 L. ed. 176; *Freeport W. Co. v. Freeport* (1901) 180 U. S. 587, 21 Sup. Ct. 493, 45 L. ed. 679. See also *Murray v. Pocatello* (1912) 226 U. S. 318, 33 Sup. Ct. 107, 57 L. ed. 239; *Rogers P. W. Co. v. Fergus* (1901) 180 U. S. 624, 21 Sup. Ct. 490, 45 L. ed. 702; *Portland Ry., L. & P. Co. v. Portland* (1912) 201 Fed. 119.

³⁴ See also *Berryman v. Whitman College* (1912) 222 U. S. 334, 32 Sup. Ct. 147, 56 L. ed. 225: territories are like municipalities in that they possess only powers bestowed upon them. And see *Northern P. Ry. Co. v. State* (1908) 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed. 630; *Brummitt v. Ogden W. W. Co.* (1908) 33 Utah, 285, 93 Pac. 828; *Indianapolis v. Navin* (1897) 151 Ind. 139, 47 N. E. 525, 41 L. R. A. 337; *Pope, Municipal Contracts and Rate Regulation*, 16 Harv. L. Rev. 1.—As was said in *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 274, 29 Sup. Ct. 50, 52, 53 L. ed. 176, 183, "It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves, may, through their relation with other facts, turn the balance one way or the other." In that case, as the court pointed out, "The charter gave to the council the power 'by ordinance . . . to regulate telephone service and the use of telephones within the city, . . . and to fix and determine the charges for telephones and telephone service and connections.' This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement." Later on the court said, "The decisions of this court, upon which the appellant relies, where a contract of this kind was found and enforced, all show unmistakably legislative authority to enter into the contract. In *Los Angeles v. Los Angeles C. W. Co.* (1900) 177 U. S. 558, 20 Sup. Ct. 736, 44 L. ed. 886, the contract was in specific terms ratified and confirmed by the legislature. In *Detroit v. Detroit C. S. Ry. Co.* (1902) 184 U. S.

The claims of exemption have been sustained in those cases in which the authority of the municipality to make the contract has appeared clearly and unmistakably; but in all other cases the claim of exemption from regulation has been denied.

368, 22 Sup. Ct. 410, 46 L. ed. 592, the contract was made in obedience to an act of the legislature that the rates should be 'established by agreement between said company and the corporate authorities.' The opinion of the court, after saying (184 U. S. at 382, 22 Sup. Ct. at 416, 46 L. ed. at 606), 'It may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinance in question, including rates of fare,' pointed out (184 U. S. at 386, 22 Sup. Ct. at 417, 46 L. ed. at 607) that 'it was made matter of agreement by the express command of the legislature.' In *Cleveland v. Cleveland C. Ry. Co.* (1904) 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102, the legislative authority conferred upon the municipality was described in the opinion of the court (194 U. S. at 534, 24 Sup. Ct. at 761, 762, 48 L. ed. at 1107) as 'comprehensive power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended and consolidated.' In *Cleveland v. Cleveland E. Ry. Co.* (1906) 201 U. S. 529, 26 Sup. Ct. 513, 50 L. ed. 854, precisely the same authority appeared. In *Vicksburg v. Vicksburg W. Co.* (1907) 206 U. S. 496, 27 Sup. Ct. 762, 51 L. ed. 1155, the court said (206 U. S. at 508, 27 Sup. Ct. at 766, 51 L. ed. at 1160): 'The grant of legislative power upon its face is unrestricted, and authorizes the "city to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks."' Moreover, in this case the construction of the Supreme Court of Mississippi of its own statutes was followed. On the other hand, it was held in *Freeport W. Co. v. Freeport* (1901) 180 U. S. 587, 21 Sup. Ct. 493, 45 L. ed. 679, that two acts of the legislature passed on successive days authorizing municipalities to 'contract for a supply of water for public use for a period not exceeding thirty years,' and to authorize private persons to construct waterworks 'and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years,' did not confer an authority upon the municipality to contract that the water company should be exempt from the exercise of the governmental power to regulate rates. In this case, too, the construction of the highest court of the state was followed. See *Rogers P. W. Co. v. Fergus* (1901) 180 U. S. 624, 21 Sup. Ct. 490, 45 L. ed. 702. All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar:" 211 U. S. at 276, 277, 29 Sup. Ct. at 53, 54, 53 L. ed. at 184.

Contracts between state and carrier.

197. While a public service corporation may by contract with the state or with a local government secure some exemptions from regulation of its rates, the rule must be stated in guarded language. The contracts which have been enforced have all been contracts establishing maximum rates. And the court has been careful to suggest that the exemptions must be for a definite term, not grossly unreasonable in point of time.³⁵ Even without this suggestion it would seem clear that there must be some limits to the power of the state to bargain away its right to regulate public service corporations; that, for example, a statute by which a state waived its right to prevent discrimination in rates would not invalidate subsequent state legislation against such discrimination. In cases in which rates were not involved the court has repeatedly decided that there are serious limitations upon the power of the state to bargain away its right to enact legislation.³⁶

Still, if the legislature has by a definite contract authorized a carrier to charge specific rates, the courts can-

³⁵ *Home T. & T. Co. v. Los Angeles* (1908) 211 U. S. 265, 273, 29 Sup. Ct. 50, 52, 53 L. ed. 176; *Vicksburg v. Vicksburg W. Co.* (1907) 206 U. S. 496, 508, 515, 27 Sup. Ct. 762, 766, 769, 51 L. ed. 1155. See also *Portland Ry., L. & P. Co. v. Portland* (1912) 201 Fed. 119, 125.

³⁶ See e. g., *West C. S. R. Co. v. People* (1906) 201 U. S. 506, 26 Sup. Ct. 518, 50 L. ed. 845; *Northern P. Ry. Co. v. Minnesota* (1908) 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed. 630; *Texas & N. O. R. Co. v. Miller* (1911) 221 U. S. 408, 31 Sup. Ct. 534, 55 L. ed. 789; and also *Louisville & N. R. Co. v. Kentucky* (1902) 183 U. S. 503, 518, 22 Sup. Ct. 95, 101, 46 L. ed. 298; *Pearsall v. Great N. Ry. Co.* (1896) 161 U. S. 646, 673, 675, 16 Sup. Ct. 706, 713, 714, 40 L. ed. 838; cases cited in *Patterson, The United States and the States Under the Constitution*, 2d ed., pp. 178, 149; *Black, Constitutional Law*, 3d ed., p. 737; *Eubank v. Richmond* (1912) 226 U. S. 137, 142, 33 Sup. Ct. 76, 77, 57 L. ed. 156. Compare *Owensboro v. Cumberland T. & T. Co.* (1913) 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389; *Grand T. W. Ry. Co. v. South Bend* (1913) 227 U. S. 544, 33 Sup. Ct. 303, 57 L. ed. 633.

not say that the common law limitation as to rates remains nevertheless in force and may be enforced as such by the courts.³⁷ The legislature certainly has power to change the common law.³⁸

Contracts between carriers or between carrier and patron.

198. If a state legislature attempted to abrogate a contract between two carriers or between a carrier and one of its patrons simply in order to relieve one of the parties to that contract from a burdensome obligation, such a statute might well be declared unconstitutional. But if the invalidating of contracts were simply a necessary incident³⁹ to the enforcement of a regulation enacted for public ends, it seems that such a statute should be sustained. As the court has well said, "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter."⁴⁰

³⁷ This suggestion was made in *Pope, Municipal Contracts and Rate Regulation*, 16 Harv. L. Rev. 1, 20, 21; *Fenwick, Charter Contracts and the Regulation of Rates*, 9 Mich. L. Rev. 225, 227.

³⁸ See sec. 33, *supra*.

³⁹ See comment in note 65 in Chapter 1 on *Armour P. Co. v. United States* (1908) 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681.

⁴⁰ *Hudson C. W. Co. v. McCarter* (1908) 209 U. S. 349, 357, 28 Sup. Ct. 529, 531, 52 L. ed. 828. See also *Knoxville W. Co. v. Knoxville* (1903) 189 U. S. 434, 438, 23 Sup. Ct. 531, 532, 47 L. ed. 887; *Osborne v. San Diego L. & T. Co.* (1900) 178 U. S. 22, 20 Sup. Ct. 860, 44 L. ed. 961; *Chicago, B. & Q. R. Co. v. Iowa* (1876) 94 U. S. 155, 24 L. ed. 94; *Manigault v. Springs* (1905) 199 U. S. 473, 480, 26 Sup. Ct. 127, 130, 50 L. ed. 274, in the last of which the court said, "The interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. . . Parties by entering into contracts may not estop the legislature from enacting laws intended for the public good." And see *United States T. Co. v. Central U.*

POWER TO ALTER, AMEND OR REPEAL.

199. Many of the states have by their constitutions or by general statutes reserved the right to alter, amend or repeal charters of incorporation.⁴¹ Those reservations vary in their terms⁴² and of course it is impossible here to discuss the extent of the reserved power in the several states. It is sufficient to point out that such reservations become part of the charters which are subsequently granted and that they have very materially affected the operation of the impairment of contract clause.⁴³ By

T. Co. (1913) 202 Fed. 66; *Portland Ry., L. & P. Co. v. Portland* (1912) 200 Fed. 890; *Buffalo E. S. R. Co. v. Buffalo S. R. Co.* (1888) 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 384, and annotations thereto in L. R. A. Cas. as Authorities; *Jamieson v. Indiana N. G. Co.* (1891) 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; and language used in *Philadelphia, B. & W. R. Co. v. Schubert* (1912) 224 U. S. 603, 613, 614, 32 Sup. Ct. 589, 592, 56 L. ed. 911, the last of which relates to federal legislation, to which, of course, the impairment of contract clause does not apply. With the cases in this note compare *Portland Ry., L. & P. Co. v. Portland* (1912) 201 Fed. 119; *Omaha W. Co. v. Omaha* (1906) 147 Fed. 1, 12 L. R. A. N. S. 736.

⁴¹ The provisions which were in force in the several states in 1905 appear in 44 Am. L. Reg. N. S. 160-169 as an appendix to an article by Horace Stern, Esq., on Limitations on the Power of a State Under a Reserved Right to Alter, Amend or Repeal Charters of Incorporation.

⁴² This is well pointed out in the opinion in *Ex parte Koehler* (1885) 23 Fed. 529, 531. Some of the expressions in opinions cited in note 43, *infra*, may possibly be explained on the grounds set forth in *Ex parte Koehler*.

⁴³ See, e. g., *Berea College v. Kentucky* (1908) 211 U. S. 45, 29 Sup. Ct. 33, 53 L. ed. 81; *Polk v. Mutual R. F. L. Assn.* (1907) 207 U. S. 310, 28 Sup. Ct. 65, 52 L. ed. 222; *Fair H. & W. R. Co. v. New Haven* (1906) 203 U. S. 379, 27 Sup. Ct. 74, 51 L. ed. 237; *San Antonio T. Co. v. Altgelt* (1906) 200 U. S. 304, 26 Sup. Ct. 261, 50 L. ed. 491; *Stanislaus County v. San J. & K. R. C. & I. Co.* (1904) 192 U. S. 201, 24 Sup. Ct. 241, 48 L. ed. 406; *Spring V. W. W. v. Schottler* (1884) 110 U. S. 347, 4 Sup. Ct. 48, 28 L. ed. 173; *Close v. Glenwood Cemetery* (1882) 107 U. S. 466, 476, 2 Sup. Ct. 267, 274, 27 L. ed. 408; *Stone v. Wisconsin* (1876) 94 U. S. 181, 24 L. ed. 102; *People v. Public Service Comn.* (1912) 153 N. Y. App. Div. 129, 138 N. Y. Supp. 434; *Matthews v. Board of Corp. Comrs.* (1899) 97 Fed. 400; *Parker v. Metropolitan R. Co.* (1872) 109 Mass. 506; cases in note 44, *infra*; *Patterson, The United States and the States Under the Constitution*,

virtue of such statutes and provisions of the state constitutions, the states may withdraw from the corporations the right to continue to exercise powers which have been bestowed upon them by the charters of incorporation, and it may modify those powers. This is true even though in so doing it destroys the power of a corporation to meet its existing liabilities.⁴⁴

Where, however, by the exercise of those powers property has been acquired, the reserved right to alter, amend or repeal the charter of incorporation does not empower the state to deprive the share-holders of a corporation of that property.⁴⁵ It does not authorize the state to violate the Fourteenth Amendment. We have already considered the question whether a state may by contract acquire over a corporation power which the state would not oth-

2d ed., p. 165; Stern, *op. cit.*, 44 Am. L. Reg. N. S. 17, 18; *Southern P. Co. v. Portland* (1913) 227 U. S. 559, 33 Sup. Ct. 308, 57 L. ed. 642. Compare *Owensboro v. Cumberland T. & T. Co.* (1913) 230 U. S. 58, 33 Sup. Ct. 989, 57 L. ed. 1389; *Pennsylvania R. Co. v. Philadelphia County* (1908) 220 Pa. 100, 68 Atl. 676, 15 L. R. A. N. S. 108, with which see 44 Am. L. Reg. N. S. 17, 18, note.

⁴⁴ *Calder v. Michigan* (1910) 218 U. S. 591, 599, 31 Sup. Ct. 122, 123, 54 L. ed. 1163; *Polk v. Mutual R. F. L. Assn.* (1907) 207 U. S. 310, 28 Sup. Ct. 65, 52 L. ed. 222; *Manigault v. Springs* (1905) 199 U. S. 473, 480, 26 Sup. Ct. 127, 130, 50 L. ed. 274; *Knoxville W. Co. v. Knoxville* (1903) 189 U. S. 434, 437, 438, 23 Sup. Ct. 531, 532, 47 L. ed. 887; *New O. W. Co. v. Louisiana* (1902) 185 U. S. 336, 353, 354, 22 Sup. Ct. 691, 697, 46 L. ed. 936; *Chicago L. I. Co. v. Needles* (1885) 113 U. S. 574, 5 Sup. Ct. 681, 28 L. ed. 1084; *Mumma v. Potomac Co.* (1834) 8 Pet. 281, 8 L. ed. 945; see also *Monongahela N. Co. v. United States* (1893) 148 U. S. 312, 338, 340, 13 Sup. Ct. 622, 631, 632, 37 L. ed. 463; *Newport & C. B. Co. v. United States* (1881) 105 U. S. 470, 26 L. ed. 1143; *Greenwood v. Freight Co.* (1881) 105 U. S. 13, 26 L. ed. 961.

⁴⁵ *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 698, 19 Sup. Ct. 565, 570, 43 L. ed. 858; *County of Santa Clara v. Southern P. R. Co.* (1883) 18 Fed. 385; *County of San Mateo v. Southern P. R. Co.* (1883) 13 Fed. 722; *Bacon v. Robertson* (1885) 18 How. 480, 15 L. ed. 499; *Mumma v. Potomac Co.* (1834) 8 Pet. 281, 8 L. ed. 945. Compare Stern, *Limitations on the Power of a State Under the Reserved Right to Alter, Amend or Repeal Charters of Incorporation*, 44 Am. L. Reg. N. S. 1, 36.

erwise possess.⁴⁶ But such a power clearly is not obtained by a mere reservation of the right to alter, amend or repeal the charter.

So also, while a state may repeal a charter for any reason whatever and may doubtless so do because of a refusal on the part of the corporation to comply with a statute which it is beyond the power of the state to enact,⁴⁷ this reserved power to alter, amend or repeal the charter simply places a power of punishment in the hands of the state and does not validate a statute which would violate a provision of the Constitution other than the impairment of contract clause.⁴⁸

A state may, however, regardless of any reservation of power to repeal the charter, revoke that charter for misuser without thereby violating the Constitution.⁴⁹ And where the property of an individual might be appropriated upon the payment of just compensation, the property of a corporation or of its stock-holders may unquestionably be appropriated in the same manner.⁵⁰

⁴⁶ See sec. 22, *supra*.

⁴⁷ See *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 697, 698, 19 Sup. Ct. 565, 570, 43 L. ed. 858; opinion of Holmes, J., dissenting, in *Western U. T. Co. v. Kansas* (1910) 216 U. S. 1, 54, 55, 30 Sup. Ct. 190, 209, 54 L. ed. 355, and cases there cited.

⁴⁸ *Lake S. & M. S. Ry. Co. v. Smith* (1899) 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858. Compare *Chesapeake & P. T. Co. v. Manning* (1902) 186 U. S. 238, 22 Sup. Ct. 881, 46 L. ed. 1144, and dissenting opinion in that case.

⁴⁹ *Cosmopolitan Club v. Virginia* (1908) 208 U. S. 378, 28 Sup. Ct. 394, 52 L. ed. 536.

⁵⁰ *Long I. W. S. Co. v. Brooklyn* (1897) 166 U. S. 685, 17 Sup. Ct. 718, 41 L. ed. 1165; *Offield v. New Y., N. H. & H. R. Co.* (1906) 203 U. S. 372, 27 Sup. Ct. 72, 51 L. ed. 231.

CHAPTER VIII.

PREFERENCES TO PORTS.

INTRODUCTORY.

200. The provision.

201. **ORGANS OF GOVERNMENT RESTRAINED.**

BEARING ON RATE REGULATION.

202. In general.

203. Differentials.

INTRODUCTORY.

The provision.

200. The Constitution in Article 1, section 9, clause 6, provides that "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another."

ORGANS OF GOVERNMENT RESTRAINED.

201. Both the context and the subject-matter show clearly that this clause of the Constitution relates only to the federal government;¹ and, on the other hand, the clause obviously applies not only to legislation but also to other governmental action, so that even though an act of Congress were in itself constitutional, the giving of a

¹ See *Munn v. Illinois* (1876) 94 U. S. 113, 135, 24 L. ed. 77. The senatorial arguments quoted in 41 Am. L. Rev. 824-826 show a surprising oversight of the distinction between governmental action and individual action. Compare the *Civil Rights Cases* (1883) 109 U. S. 3, 3 Sup. Ct. 18, 27 L. ed. 835.

preference by a commission acting under that statute would be unconstitutional.²

BEARING ON RATE REGULATION.

In general.

202. It is obvious that rate regulations may be of such a nature as to violate this provision of the Constitution. Rate regulations are unquestionably regulations of commerce;³ and if they are of such a nature as to cause vessels to load or unload at a port of one state rather than at a port of another state they must be prohibited by the sweeping language of the clause which we are considering.⁴

It is true that the court recognizes the fact that it cannot carry out a constitution with mathematical accuracy to logical extremes;⁵ and it refuses to make far-fetched interpretations of this restraint upon the power which was granted to Congress by the commerce clause.⁶ Thus, while the regulation of interstate commerce by rail may give an advantage to commerce wholly by water and to ports which can be reached by means of inland naviga-

² *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014; *Noyes, American Railroad Rates*, 228.

³ Chap. 1, *supra*.

⁴ Compare *Noyes, American Railroad Rates*, 227.—On the history of the adoption of the provision see *Knowlton v. Moore* (1900) 178 U. S. 41, 104-106, 20 Sup. Ct. 747, 772, 44 L. ed. 969.

⁵ See secs. 110, 139, note, 140, note, 101, *supra*.

⁶ See decisions and discussions in *Pennsylvania v. Wheeling & B. B. Co.* (1885) 18 How. 421, 15 L. ed. 435; *South Carolina v. Georgia* (1876) 93 U. S. 4, 23 L. ed. 782. In the former case it was held that the clause did not invalidate an act of Congress which legalized the construction of a bridge over navigable waters, although the bridge obstructed the commerce of a port in another state; and in the latter case it was held that the clause did not apply to a diverting of water from one navigable stream to another in order to improve navigation in the latter stream.

tion, the fact that such regulation may affect the ports of one state more than those of another is not in itself sufficient to render the legislation unconstitutional.⁷ The legislation applies uniformly throughout the United States to all commerce of the same nature; and the court declares that the advantages which some shippers may possess are natural advantages and are not created by statutory law.⁸

Differentials.

203. It is possible also that the court would recognize the validity of differentials, so far as they were created to offset the natural disadvantages of one or more of the ports affected and to place those ports on a plane more nearly equal.⁹ This question apparently has never been raised in court.

⁷ *Armour P. Co. v. United States* (1908) 209 U. S. 56, 80, 28 Sup. Ct. 428, 435, 52 L. ed. 681, affirming *Armour P. Co. v. United States* (1907) 153 Fed. 1, 14, 15, 14 L. R. A. N. S. 400.

⁸ *Armour P. Co. v. United States*, *ubi supra*.

⁹ On this point see Noyes, *American Railroad Rates*, 229, where it is said, "A preference, within the meaning of the constitutional provision, seems clearly to mean an *undue* advantage. The commission would have the right to consider the conditions of the railroads and the traffic going to different ports. The requirement of a uniform charge per ton per mile to different ports instead of treating the ports with equality might give the very preference prohibited by the Constitution. Levelling rates without regard to conditions would create uniformity without equality. But what would be the result should a commission, with rate-making power, attempt to adjust differentials between different ports? An arbitrary differential would undoubtedly infringe the constitutional provision against port preferences—assuming that it applies to land transportation. A differential based upon differences in conditions, on the other hand, would not seem to be an unlawful preference." But in Morawetz, *The Power of Congress to Regulate Railway Rates*, 18 Harv. L. Rev. 572, 586, 587, it is said, "It is obvious that an act of Congress, or an order of a commission, merely fixing the *maximum* rates that may be charged by railway companies in respect of shipments to or through certain ports, would not give a preference to the

But, on the other hand, it seems clear that if a differential more than offset natural disadvantages or, instead of merely allowing the ports of one state to profit by the natural advantages of their position, were to give to them

ports of one state over those of another, because the railway companies leading to each port would compete freely with those leading to other ports by reducing their rates. The establishment of a differential in favor of the railways leading to a certain port implies that the railways leading to other ports shall be prohibited from reducing their rates below a prescribed minimum, and that free competition among them shall thus be stopped. While, possibly, it may be held that the establishment of such a differential in respect of shipments between interior points and the cities situated at different ports would not necessarily give a direct preference to any port, because such shipments may not go through the ports [on which, see opinion of Attorney-General Moody, as printed in Hearings of Senate Committee on Interstate Commerce, May, 1905, vol. II, p. 1672, 25 Opinions of Attorney-General, 437, 438], it seems clear that a preference would be given by a differential in respect of through shipments to or from foreign points. As the through rates in respect of shipments between the same points must necessarily be substantially alike by all routes, the obvious purpose of the differential would be to give to the steamship lines from certain ports a larger share of the through rates than the steamship lines from other ports. It is difficult to see how the courts could avoid recognizing the fact that the direct and necessary result would be to give a preference by statute to certain ports at the expense of others. It is no answer to say that a regulation of Congress, or of a commission, merely establishing 'the just relation of rates' upon shipments by different ports, would not grant a preference to the ports of any state. Stated baldly, this would mean that Congress, or a commission, can take away from a particular port its natural advantages by granting a law-made advantage to other ports by means of a preferential regulation of commerce. The Constitution provides that no preference shall be given by *any* regulation of commerce to the ports of one state over those of another. To hold that Congress or a commission can by law give to the various ports such preferences as in the judgment of Congress, or a commission, will equalize their natural advantages would wholly destroy the value of the constitutional prohibition. The constitutional prohibition was designed to prevent sectional legislation that might array one part of the country against another. . . . If the power to fix the relative rates of transportation to and from different ports or sections of the country is conferred upon [the Commission], the adjustment of railway rates in the United States will inevitably become a political question." See also Olney, *Some Legal Aspects of Railroad Rate-making by Congress*, 181 N. A. Rev. 481, 482, 483; Hearings of Senate Committee on Interstate Commerce, April, 1905, vol. II, pp. 1121, 1123.

a distinct advantage over the ports of another state, which advantage rested on a preference or policy upon the part of Congress or its commission, such a differential should be declared unconstitutional.¹⁰

¹⁰ See *Armour P. Co. v. United States* (1908) 209 U. S. 56, 80, 28 Sup. Ct. 428, 435, 52 L. ed. 681; and references to Morawetz and Olney in note 9, *supra*; with which compare *Pennsylvania v. Wheeling & B. B. Co.* (1855) 18 How. 421, 433, 15 L. ed. 435; *South Carolina v. Georgia* (1876) 93 U. S. 4, 13, 23 L. ed. 782.

CHAPTER IX.

LIMITATIONS UPON FEDERAL JUDICIAL POWER.

SUITS AGAINST THE GOVERNMENT.

- 204. General rule.
- 205. What governments come within the rule.
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ENFORCEMENT OF LAW.

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SUITS AGAINST THE GOVERNMENT.

General rule.

204. A sovereign government cannot be subjected to suit against its will by any individual.¹ This principle

¹ See *Hans v. Louisiana* (1890) 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 842; *United States v. Lee* (1882) 106 U. S. 196, 206, 1 Sup. Ct. 240, 249, 27 L. ed. 171; *Porto Rico v. Rosaly* (1913) 227 U. S. 270, 33 Sup. Ct. 352, 57 L. ed. 507; *Kawananakoa v. Polyblank* (1907) 205 U. S. 349, 27 Sup. Ct. 526, 51 L. ed. 834; *Hopkins v. Clemson Agricultural College* (1911) 221 U. S. 636, 642, 644, 31 Sup. Ct. 654, 656, 657, 55 L. ed. 683; *Murray v. Wilson D. Co.* (1909) 213 U. S. 151, 29 Sup. Ct. 458, 53 L. ed. 742; *Kansas v. Colorado* (1907) 206 U. S. 46, 83, 27 Sup. Ct. 655, 661, 51 L. ed. 950; *Briggs v. Lightboats* (1865) 93 Mass. (11 Allen) 157, 162; *Singewald, The Doctrine of Non-suability of the State in the United States*, 28 Johns Hopkins University Studies, Part I; and also Wolfman, *Sovereigns as Defendants*, 4 Am. Jour. of Int. Law. 373.

was well-recognized long before the adoption of the Federal Constitution² and the men who were most instrumental in securing the adoption of the Constitution were careful to point out during the discussion which preceded its adoption that there was nothing in the grant of judicial power to the federal government which would enable the federal judiciary to take jurisdiction of such a suit against a state.³

In the year 1793, in *Chisholm v. Georgia*,⁴ the court rendered a decision which was clearly inconsistent with this principle. It decided that the provision in Article III which gave to the federal government judicial power over "controversies between a state and citizens of another state" applied not merely to cases in which a state was the plaintiff but also to cases in which a state was against its will the defendant. This decision, however, was promptly and emphatically overruled⁵ by the adoption of the Eleventh Amendment which declares that "The judicial power of the United States shall not be construed to extend to any suit at law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

² *United States v. Lee* (1882) 106 U. S. 196, 205, 1 Sup. Ct. 240, 247, 27 L. ed. 171; *Hans v. Louisiana* (1890) 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 842.

³ See *Hans v. Louisiana* (1890) 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 842, and authorities cited in opinion.

⁴ 2 Dall. 419, 1 L. ed. 440.

⁵ See Singewald, *The Doctrine of Non-suability of the State in the United States*, 28 Johns Hopkins University Studies, 24; *Hans v. Louisiana* (1890) 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 842; Guthrie, *The Eleventh Amendment*, 8 Col. L. Rev. 183, 185, 186. Compare *South Dakota v. North Carolina* (1904) 192 U. S. 286, 318, 24 Sup. Ct. 269, 275, 48 L. ed. 448; *Ex parte Young* (1908) 209 U. S. 123, 150, 28 Sup. Ct. 441, 450, 52 L. ed. 714, 13 L. R. A. N. S. 932, 943, 14 A. & E. An. Cas. 764, 771.

The effect of this Amendment was to re-establish the law as it had stood before the decision of the Supreme Court. The Amendment affected suits then pending as well as suits which might be brought in the future.⁶ Literally interpreted it would have denied to the federal courts jurisdiction over a suit which was brought by a citizen of another state against a state with the consent of the defendant state; yet the federal courts have continued to exercise jurisdiction in such cases.⁷ And the Amendment does not in terms apply to a suit brought against a state by one of its own citizens; yet when such a suit was brought in a case involving the application of the Federal Constitution, and it was claimed that the grant of judicial power in all cases arising under the Constitution was sufficient to give the court jurisdiction, the court enforced the principle which was disregarded in *Chisholm v. Georgia* and said that a state may not be sued by an individual without its consent.⁸

In short, the court does not strictly follow the terms of the Eleventh Amendment but, in view of the reason for its adoption, the court rather regards the Amendment as requiring the courts to observe the ancient rule as to the

⁶ *Hollingsworth v. Virginia* (1798) 3 Dall. 378, 1 L. ed. 644.

⁷ *Clark v. Barnard* (1883) 108 U. S. 436, 447, 2 Sup. Ct. 878, 883, 27 L. ed. 780; *Curran v. Arkansas* (1853) 15 How. 304, 309, 14 L. ed. 705; *Hans v. Louisiana* (1890) 134 U. S. 1, 17, 10 Sup. Ct. 504, 508, 33 L. ed. 842. Compare *Desert W., O. & I. Co. v. California* (1913) 202 Fed. 498; Singewald, *The Doctrine of Non-suability of the State in the United States*, 28 Johns Hopkins University Studies, 29-37; Guthrie, *The Eleventh Amendment*, 8 Col. L. Rev. 183, 188. On the relation of the Eleventh Amendment to suits in admiralty see dissenting opinion of Johnson, J., in *Governor of Georgia v. Madrazo* (1828) 1 Pet. 110, 124, 7 L. ed. 73; Singewald, *ubi supra*, 23.

⁸ *Hans v. Louisiana* (1890) 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 842. See also *North Carolina v. Temple* (1890) 134 U. S. 22, 10 Sup. Ct. 509, 33 L. ed. 849; *Smith v. Reeves* (1900) 178 U. S. 436, 20 Sup. Ct. 919, 44 L. ed. 1140.

suability of a sovereign government which was disregarded in *Chisholm v. Georgia*.

What governments come within the rule.

205. The rule that a sovereign government cannot be subjected to suit against its will by any individual applies to the federal government⁹ and to the territories¹⁰ as well as to the states,¹¹ but it does not apply to subordinate divisions of the states, such as counties,¹² or to public corporations, such as a state agricultural college.¹³

Suits against public officials.

206. The rule has been held to apply not only where the state is actually named as a party defendant on the record but also where the proceeding, though nominally against an officer, is really against the state or is one in which it is an indispensable party. No suit, therefore,

⁹ See *International P. S. Co. v. Bruce* (1904) 194 U. S. 601, 24 Sup. Ct. 820, 48 L. ed. 1134; *Belknap v. Schild* (1896) 161 U. S. 10, 16 Sup. Ct. 443, 40 L. ed. 599; *United States v. Lee* (1882) 106 U. S. 196, 1 Sup. Ct. 240, 27 L. ed. 171. Compare *National Home for Disabled Volunteer Soldiers v. Parrish* (1913) 229 U. S. 494, 33 Sup. Ct. 944, 57 L. ed. 1296.

¹⁰ *Kawananakoa v. Polyblank* (1907) 205 U. S. 349, 27 Sup. Ct. 526, 51 L. ed. 834.

¹¹ *Hans v. Louisiana* (1890) 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 842; *North Carolina v. Temple* (1890) 134 U. S. 22, 10 Sup. Ct. 509, 33 L. ed. 849. Compare *Ex parte Nebraska* (1908) 209 U. S. 436, 28 Sup. Ct. 581, 52 L. ed. 876, for a case in which the state was held to have no interest in the suit.

¹² *Lincoln County v. Luning* (1890) 133 U. S. 529, 10 Sup. Ct. 363, 33 L. ed. 766; *Camden I. Ry. Co. v. Catlettsburg* (1904) 129 Fed. 421. See also *Ettor v. Tacoma* (1913) 228 U. S. 148, 154, 33 Sup. Ct. 428, 430, 57 L. ed. 773.

¹³ *Hopkins v. Clemson Agricultural College* (1911) 221 U. S. 636, 645-649, 31 Sup. Ct. 654, 657, 658, 55 L. ed. 890. See also *National Home for Disabled Volunteer Soldiers v. Parrish* (1913) 229 U. S. 494, 33 Sup. Ct. 944, 57 L. ed. 1296.

can be maintained against a public officer which seeks to compel him to do any affirmative act which affects the state's political or property rights, such as exercising the state's power of taxation, or paying out its money in his possession on the state's obligations, or executing a contract.¹⁴

But the court has repeatedly sustained injunctions issued against public officials to restrain the commission of acts which although done under color of authority would be unconstitutional and would cause irreparable injury.¹⁵ Thus, a tax-collector has been enjoined where,

¹⁴ See *Hopkins v. Clemson Agricultural College* (1911) 221 U. S. 636, 642, 31 Sup. Ct. 654, 656, 55 L. ed. 890, citing *Cunningham v. Macon & B. R. Co.* (1883) 109 U. S. 446, 3 Sup. Ct. 292, 609, 27 L. ed. 992; *North Carolina v. Temple* (1890) 134 U. S. 22, 10 Sup. Ct. 509, 33 L. ed. 849; *Louisiana v. Steele* (1890) 134 U. S. 230, 10 Sup. Ct. 511, 33 L. ed. 891; *Louisiana v. Jumel* (1882) 107 U. S. 711, 2 Sup. Ct. 128, 27 L. ed. 448; *Pennoyer v. McConaughy* (1891) 140 U. S. 1, 11 Sup. Ct. 699, 35 L. ed. 363; *In re Ayers* (1887) 123 U. S. 443, 8 Sup. Ct. 164, 31 L. ed. 216; *Hans v. Louisiana* (1890) 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 842; *Harkrader v. Wadley* (1898) 172 U. S. 148, 19 Sup. Ct. 119, 43 L. ed. 399; *Hagood v. Southern* (1886) 117 U. S. 52, 70, 6 Sup. Ct. 608, 616, 29 L. ed. 805. See also *Murray v. Wilson D. Co.* (1909) 213 U. S. 151, 29 Sup. Ct. 458, 53 L. ed. 742; *International P. S. Co. v. Bruce* (1904) 194 U. S. 601, 24 Sup. Ct. 820, 48 L. ed. 1134; *Belknap v. Schild* (1896) 161 U. S. 10, 16 Sup. Ct. 443, 40 L. ed. 599. Compare, however, *Tindal v. Wesley* (1897) 167 U. S. 204, 17 Sup. Ct. 770, 42 L. ed. 137; *United States v. Lee* (1882) 106 U. S. 196, 1 Sup. Ct. 240, 27 L. ed. 171; *Atchison, T. & S. F. Ry. Co. v. O'Connor* (1912) 223 U. S. 280, 32 Sup. Ct. 216, 56 L. ed. 436. *Osborn v. United States* (1824) 9 Wheat. 738, 6 L. ed. 204, is discussed in 1 Harv. L. Rev. 223.

¹⁵ See *Hopkins v. Clemson Agricultural College* (1911) 221 U. S. 636, 642-644, 31 Sup. Ct. 654, 656, 657, 55 L. ed. 890; *Hans v. Louisiana* (1890) 134 U. S. 1, 20, 10 Sup. Ct. 504, 509, 33 L. ed. 842; *Guthrie, The Eleventh Amendment*, 8 Col. L. Rev. 183; and also *Elliott, The Legislatures and the Courts*, 5 Pol. Sci. Quar. 224, 227. Compare *International P. S. Co. v. Bruce* (1904) 194 U. S. 601, 24 Sup. Ct. 820, 48 L. ed. 1134; *Belknap v. Schild* (1896) 161 U. S. 10, 16 Sup. Ct. 443, 40 L. ed. 599. On suits to recover property held by the state see *Singewald, The Doctrine of Non-suability of the State in the United States*, 28 Johns Hopkins University Studies, Part II, chap. 3.

under an unconstitutional law, he was about to sell the property of the tax-payer;¹⁶ a state land commissioner has been enjoined from proceeding under an unconstitutional act to cause irreparable damage to property rights;¹⁷ commissions have been restrained from enforcing statutes which illegally burdened interstate commerce;¹⁸ and, to refer to cases concerning rate regulation, an attorney-general has been restrained from suing to recover penalties imposed by a statute which was declared unconstitutional,¹⁹ and railroad commissions have been enjoined from enforcing rates which the court decided were unconstitutional.²⁰

¹⁶ *Poindexter v. Greenhow* (1885) 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. ed. 185.

¹⁷ *Pennoyer v. McConnaughey* (1891) 140 U. S. 1, 11 Sup. Ct. 699, 35 L. ed. 363. See also *Philadelphia Company v. Stimson* (1912) 223 U. S. 605, 32 Sup. Ct. 340, 56 L. ed. 570; *Ludwig v. Western U. T. Co.* (1910) 216 U. S. 146, 30 Sup. Ct. 280, 54 L. ed. 423. Compare *Oregon v. Hitchcock* (1906) 202 U. S. 60, 26 Sup. Ct. 568, 50 L. ed. 423.

¹⁸ *Mississippi R. Comn. v. Illinois C. R. Co.* (1906) 203 U. S. 335, 27 Sup. Ct. 90, 51 L. ed. 209; *McNeill v. Southern Ry. Co.* (1906) 202 U. S. 543, 26 Sup. Ct. 722, 50 L. ed. 1142.

¹⁹ *Ex parte Young* (1908) 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. N. S. 932, 14 A. & E. An. Cas. 764. See also *Herndon v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 135, 30 Sup. Ct. 633, 54 L. ed. 970; *Western U. T. Co. v. Andrews* (1910) 216 U. S. 165, 30 Sup. Ct. 286, 54 L. ed. 430; *Scully v. Bird* (1906) 209 U. S. 481, 28 Sup. Ct. 597, 52 L. ed. 899.

²⁰ *Prout v. Starr* (1903) 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584; *Smyth v. Ames* (1898) 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819; *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014. See also *Missouri, K. & T. Ry. Co. v. Hickman* (1901) 183 U. S. 53, 22 Sup. Ct. 18, 46 L. ed. 78; *Matthews and Thompson, Public Service Company Rates and the Fourteenth Amendment*, 15 Harv L. Rev. 249, 353, 360; *Singewald, The Doctrine of Non-suability of the State in the United States*, 28 Johns Hopkins University Studies, 41, 90; *Montana, W. & S. R. Co. v. Morley* (1912) 198 Fed. 991; *Louisville & N. R. Co. v. Railroad Comn.* (1912) 196 Fed. 800 (1907) 157 Fed. 944; *Central of Ga. Ry. Co. v. Railroad Comn.* (1908) 161 Fed. 925; *Seaboard A. L. Ry. Co. v. Railroad Comn.* (1907) 155 Fed. 792.

ENFORCEMENT OF LAW.

Indictment.

207. The Fifth Amendment, which refers only to the federal government,²¹ declares that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

Putting twice in jeopardy.

208. The same Amendment then provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Without having given the point proper consideration, the court holds broadly that "jeopardy of life or limb" means "jeopardy of punishment."²² The provision protects corporations as well as natural "persons."²³ It prohibits a second placing in jeopardy for the same identical act and crime:²⁴ but to violate the provision the offenses charged in the two prosecutions must be the same both in law and in fact.²⁵ If

²¹ See sec. 53, *supra*.

²² *Ex parte Lange* (1873) 18 Wall. 163, 168, 170, 21 L. ed. 872. With the references in that opinion to the common and civil law compare sec. 123, *supra*, and notes 16 in Chap. 2, and 100 in Chap. 4, *supra*. On the subject of "life or limb" consider, however, authorities cited in 17 A. & E. Enc. of L., 2d ed., 582; Black, *Constitutional Law*, 3d ed., p. 699.

²³ Sec. 57, *supra*.

²⁴ *Grafton v. United States* (1907) 206 U. S. 333, 27 Sup. Ct. 749, 51 L. ed. 1064; *United States v. Nickerson* (1855) 17 How. 204, 15 L. ed. 458.

²⁵ *Diaz v. United States* (1912) 223 U. S. 442, 32 Sup. Ct. 184, 56 L. ed. 500; *Gavieres v. United States* (1911) 220 U. S. 338, 31 Sup. Ct. 421, 55 L. ed. 489; *Flemister v. United States* (1907) 207 U. S. 372, 28 Sup. Ct. 129, 52 L. ed. 252; *Burton v. United States* (1906) 202 U. S. 344, 26 Sup. Ct. 689, 50 L. ed. 1057; *Hotema v. United States* (1902) 186 U. S. 413, 421, 422, 22 Sup. Ct. 895, 899, 46 L. ed. 1225; *United States v. Randenbush* (1834) 8 Pet. 288, 8 L. ed. 948; 17 A. & E. Enc. of L., 2d ed., 596, 602;

upon the former trial the jury has disagreed²⁶ or if a verdict against the accused person has been set aside upon his motion for error at the trial,²⁷ a second trial may be held; but where there has been a verdict in favor of the defendant the prosecution cannot be allowed a new trial.²⁸ And where a court which is empowered upon conviction to impose either a fine or imprisonment has imposed both a fine and imprisonment, and the fine has been paid, the court cannot thereafter modify its judgment by imposing imprisonment alone.²⁹

Due process of law.

209. "Due process requires that the court which assumes to determine the rights of parties shall have juris-

Black, *Constitutional Law*, 3d ed., p. 702; 12 Cyc. 280. The provision does not forbid the imposing of an additional penalty upon a prisoner upon proof of former conviction for another offense: *Graham v. West Virginia* (1912) 224 U. S. 616, 32 Sup. Ct. 583, 56 L. ed. 917. On continuing offenses see 17 A. & E. Enc. of L., 2d ed. 603. Where an act violates both a state law and a municipal ordinance a prosecution under one will not bar prosecution under the other: *Ibid.* 605; Black, *op. cit.*, p. 700: compare *Grafton v. United States* (1907) 206 U. S. 333, 27 Sup. Ct. 749, 51 L. ed. 1084; *United States v. Mason* (1909) 213 U. S. 115, 29 Sup. Ct. 480, 53 L. ed. 725.

²⁶ See cases cited in *Keerl v. Montana* (1909) 213 U. S. 135, 29 Sup. Ct. 469, 53 L. ed. 734.

²⁷ *United States v. Ball* (1896) 163 U. S. 662, 672, 16 Sup. Ct. 1192, 1195, 41 L. ed. 300. See also *Trono v. United States* (1905) 199 U. S. 521, 26 Sup. Ct. 121, 50 L. ed. 292; *Brantley v. Georgia* (1910) 217 U. S. 284, 30 Sup. Ct. 514, 54 L. ed. 768; 12 Cyc. 279.

²⁸ *Kepner v. United States* (1904) 195 U. S. 100, 24 Sup. Ct. 797, 49 L. ed. 65; *United States v. Ball* (1896) 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. ed. 300. But the government may be allowed a writ of error where an indictment is quashed, for in that case the moment of jeopardy has not been reached: *Taylor v. United States* (1907) 207 U. S. 120, 28 Sup. Ct. 53, 52 L. ed. 130. On appeals by the government in criminal cases see *United States v. Evans* (1909) 213 U. S. 297, 29 Sup. Ct. 507, 53 L. ed. 803; 20 Harv. L. Rev. 219; dissenting opinion in *Kepner v. United States*, *supra*; 17 A. & E. Enc. of L., 2d ed., 584, 585.

²⁹ *Ex parte Lange* (1873) 18 Wall. 163, 21 L. ed. 872.

diction, and that there shall be notice and opportunity for hearing given the parties. Subject to these fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law.”³⁰

Trials in criminal cases.

210. There are, however, other provisions of the Constitution which further regulate procedure in federal courts. “The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.”³¹ “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”³²

By virtue of these provisions a defendant whose removal from the district in which he was arrested to that

³⁰ *Twining v. New Jersey* (1908) 211 U. S. 78, 110, 111, 29 Sup. Ct. 14, 24, 53 L. ed. 97. See also further authorities cited in sec. 65, *supra*.

³¹ Article III, sec. 2, clause 3.

³² Amendment VI. On the history of these provisions see Connor, *The Constitutional Right to a Trial by a Jury of the Vicinage*, 57 U. of Pa. L. Rev. 192.

in which it is alleged that he committed a crime is sought is entitled to show that no offense triable in the district to which his removal is sought has been committed.³³ The provisions control criminal proceedings in the District of Columbia³⁴ as well as in the federal courts in the several states. Where, however, a crime has been committed within one of the territories Congress may designate the place of trial at any time previous to the trial.³⁵ Congress may also provide that the obtaining of transportation at a concession from the published rate shall be an offense which shall be triable in any district through which the transportation is had, for the constitutional requirement is as to the locality of the offense and not the personal presence of the offender.³⁶ The provisions apply only to criminal proceedings³⁷ in the federal courts;^{37a} and the right to trial by jury may be waived by persons charged with minor offenses.³⁸ Federal courts may also enjoin the commission of crimes and then punish their commission without trial by jury.³⁹

³³ *Tinsley v. Treat* (1907) 205 U. S. 20, 27 Sup. Ct. 430, 51 L. ed. 689; *Gould v. Youngworth* (1907) 205 U. S. 538, 27 Sup. Ct. 791, 51 L. ed. 920.

³⁴ *Callan v. Wilson* (1888) 127 U. S. 540, 8 Sup. Ct. 1301, 32 L. ed. 223.

³⁵ *Cook v. United States* (1891) 138 U. S. 157, 11 Sup. Ct. 268, 34 L. ed. 906.

³⁶ *Armour P. Co. v. United States* (1908) 209 U. S. 56, 28 Sup. Ct. 428, 52 L. ed. 681.

³⁷ *United States v. Zucker* (1896) 161 U. S. 475, 16 Sup. Ct. 641, 40 L. ed. 777; *Ex parte Terry* (1888) 128 U. S. 289, 9 Sup. Ct. 77, 32 L. ed. 405; *Fong Yue Ting v. United States* (1893) 149 U. S. 698, 13 Sup. Ct. 977, 1016, 37 L. ed. 905; *Wong Wing v. United States* (1896) 163 U. S. 228, 16 Sup. Ct. 977, 41 L. ed. 140; *United States v. Williams* (1904) 194 U. S. 279, 24 Sup. Ct. 719, 48 L. ed. 979.

^{37a} *Nashville, C. & St. L. Ry. Co. v. Alabama* (1888) 128 U. S. 96, 9 Sup. Ct. 28, 32 L. ed. 352; *Twitchell v. Commonwealth* (1868) 7 Wall. 321, 19 L. ed. 223.

³⁸ *Schick v. United States* (1904) 195 U. S. 65, 24 Sup. Ct. 826, 49 L. ed. 99.

³⁹ *In re Debs* (1895) 158 U. S. 564, 15 Sup. Ct. 900, 39 L. ed. 1092. See

Suits at common law.

211. The Seventh Amendment declares that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This Amendment restrains the exercise of powers by the United States, but not by the states.⁴⁰ It does not affect equity cases in the federal courts;⁴¹ it does not affect cases in which a defendant has voluntarily relinquished the right to trial by jury in a particular case;⁴² and it does not forbid the awarding of a non-suit for want of sufficient evidence.⁴³ In all cases, however, in which the right of trial by jury is secured by the Constitution the jury must be unanimous in rendering its verdict.⁴⁴

The Seventh Amendment also provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." By virtue of this provision no appellate federal tribunal may consider whether the verdict of

also Mack, *The Revival of Criminal Equity*, 16 Harv. L. Rev. 389; Gregory, *Government by Injunction*, 11 Harv. L. Rev. 487; Fauntleroy, *Government by Injunction*, 69 Cent. L. J. 129; Roe, *Our Judicial Oligarchy*, 146-155.

⁴⁰ *Pearson v. Yewdall* (1877) 95 U. S. 294, 24 L. ed. 436; *Walker v. Sauvinet* (1875) 92 U. S. 90, 23 L. ed. 678; *Edwards v. Elliott* (1874) 21 Wall. 532, 22 L. ed. 487.

⁴¹ *Barton v. Barbour* (1881) 104 U. S. 126, 26 L. ed. 672; *Parsons v. Bedford* (1830) 3 Pet. 433, 446, 7 L. ed. 732. See also Patterson, *The United States and the States Under the Constitution*, 2d ed., p. 255. But where a plaintiff has an appropriate remedy at law he cannot seek relief in a court of equity: *Singer S. M. Co. v. Benedict* (1913) 229 U. S. 481, 33 Sup. Ct. 942, 57 L. ed. 1288; *Whitehead v. Shattuck* (1891) 138 U. S. 146, 11 Sup. Ct. 276, 34 L. ed. 873; *Cates v. Allen* (1893) 149 U. S. 451, 13 Sup. Ct. 833, 977, 37 L. ed. 804.

⁴² *Bank of Columbia v. Okely* (1819) 4 Wheat. 235, 4 L. ed. 559.

⁴³ *Coughran v. Bigelow* (1896) 164 U. S. 301, 17 Sup. Ct. 117, 41 L. ed. 442.

⁴⁴ *Springville v. Thomas* (1897) 166 U. S. 707, 17 Sup. Ct. 717, 41 L. ed. 1172; *American P. Co. v. Fisher* (1897) 166 U. S. 464, 17 Sup. Ct. 618, 41 L. ed. 1079.

a jury in a case at common law was against the weight of the evidence.⁴⁵ The appellate court may set aside a verdict for error of law in the proceedings and order a new trial, but it may not itself determine the issues of fact.⁴⁶

Self-incrimination.

212. The Fifth Amendment, which relates only to the

⁴⁵ *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U. S. 226, 242, 246, 17 Sup. Ct. 581, 587, 588, 41 L. ed. 979. See also *Maxwell v. Dow* (1900) 176 U. S. 581, 598, 20 Sup. Ct. 448, 494, 455, 44 L. ed. 597; *Chrisman v. Miller* (1905) 197 U. S. 313, 25 Sup. Ct. 468, 49 L. ed. 770, cases there cited, and *Backus v. Fort S. U. D. Co.* (1898) 169 U. S. 557, 565, 18 Sup. Ct. 445, 449, 42 L. ed. 853; *Kerfoot v. Farmers' & M. Bk.* (1910) 218 U. S. 281, 288, 31 Sup. Ct. 14, 15, 54 L. ed. 1042; *Mammoth M. Co. v. Grand C. M. Co.* (1909) 213 U. S. 72, 73, 29 Sup. Ct. 413, 414, 53 L. ed. 702. Compare *Kansas C. S. Ry. Co. v. Albers Comn. Co.* (1912) 223 U. S. 573, 32 Sup. Ct. 316, 56 L. ed. 556; *Elliott v. Toeppner* (1902) 187 U. S. 327, 333, 335, 23 Sup. Ct. 133, 136, 47 L. ed. 200; *Capital T. Co. v. Hof* (1899) 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873; *Cedar R. G. L. Co. v. Cedar Rapids* (1912) 223 U. S. 655, 32 Sup. Ct. 389, 56 L. ed. 594; *Ubarri v. Laborde* (1909) 214 U. S. 168, 171, 29 Sup. Ct. 549, 551, 53 L. ed. 955; *Empire S. C. Co. v. Atchison, T. & S. F. Ry. Co.* (1906) 210 U. S. 1, 28 Sup. Ct. 607, 52 L. ed. 931; *Behr, Meyer & Co. v. Campbell & Gu Tauco* (1907) 205 U. S. 403, 407, 27 Sup. Ct. 502, 504, 51 L. ed. 857. Under the judiciary act the United States Supreme Court cannot review findings of fact by state courts: *Dower v. Richards* (1894) 151 U. S. 658, 14 Sup. Ct. 452, 38 L. ed. 305; *Bement v. National H. Co.* (1902) 186 U. S. 70, 22 Sup. Ct. 747, 46 L. ed. 1058; *Minneapolis & St. L. R. Co. v. Minnesota* (1904) 193 U. S. 53, 24 Sup. Ct. 396, 48 L. ed. 614; *St. Louis & S. F. R. Co. v. Hadley* (1909) 168 Fed. 317, 339; and see *Portland Ry., L. & P. Co. v. Railroad Comn. of Oregon* (1913) 229 U. S. 397, 411, 33 Sup. Ct. 820, 827, 57 L. ed. 1259; *Maxwell v. Dow*, *supra*; *Rankin v. Emigh* (1910) 218 U. S. 27, 32, 30 Sup. Ct. 672, 675, 54 L. ed. 915; *Thomas v. Texas* (1909) 212 U. S. 278, 29 Sup. Ct. 393, 53 L. ed. 512; *Waters-Pierce Oil Co. v. Texas* (1909) 212 U. S. 86, 97, 29 Sup. Ct. 220, 221, 53 L. ed. 417; *Gulf, C. & S. F. Ry. Co. v. Texas* (1907) 204 U. S. 403, 411, 27 Sup. Ct. 360, 362, 51 L. ed. 540. The court may, however, it seems, review findings of fact by lower federal courts in so far as they involve questions concerning the jurisdiction of those courts: see *Commercial M. A. Co. v. Davis* (1909) 213 U. S. 245, 256, 29 Sup. Ct. 445, 448, 53 L. ed. 782.

⁴⁶ *Slocum v. New Y. L. I. Co.* (1913) 228 U. S. 364, 33 Sup. Ct. 523, 57 L. ed. 879; *Pedersen v. Delaware, L. & W. R. Co.* (1913) 229 U. S. 146, 33 Sup. Ct. 648, 57 L. ed. 1125. See also *Thorndike, Trial by Jury in United States Courts*, 26 Harv. L. Rev. 732.

federal government,⁴⁷ provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." This provision rendered unconstitutional an act of Congress which authorized a court to require a defendant to produce his books and papers in a suit which sought the forfeiture of his estate, on pain of having the statements of the government's counsel as to the contents thereof taken as true and used as testimony for the government;⁴⁸ and it was held to protect a witness who refused to testify under a statute which stipulated that his testimony should not be used against him;⁴⁹ but it did not protect a witness who refused to testify under a later statute which afforded him absolute immunity, federal and state, for the offense to which the question related.⁵⁰ Where, however, a witness has testi-

⁴⁷ Sec. 53, *supra*. See also *Twining v. New Jersey* (1908) 211 U. S. 78, 29 Sup. Ct. 14, 53 L. ed. 97.

⁴⁸ *Boyd v. United States* (1886) 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746. The court said, 116 U. S. at 634, 6 Sup. Ct. at 534, 29 L. ed. at 752, that while the proceeding was civil in form it was criminal in substance and effect and therefore prohibited by the Fifth Amendment. Compare 20 Harv. L. Rev. 233; 5 Harv. L. Rev. 24. On dicta in *Boyd v. United States* see Wigmore on Evidence, pp. 3126, 3127, vol. V, p. 230.

⁴⁹ *Counselman v. Hitchcock* (1892) 142 U. S. 547, 12 Sup. Ct. 195, 35 L. ed. 1110. See also *Ballman v. Fagan* (1906) 200 U. S. 186, 26 Sup. Ct. 212, 50 L. ed. 433; *In re Beer* (1908) 17 N. D. 184, 115 N. W. 672.

⁵⁰ *Brown v. Walker* (1896) 161 U. S. 591, 16 Sup. Ct. 644, 40 L. ed. 819. Four justices dissented. See also *Hale v. Henkel* (1906) 201 U. S. 43, 26 Sup. Ct. 370, 50 L. ed. 652; *Interstate Com. Comn. v. Baird* (1904) 194 U. S. 25, 45, 24 Sup. Ct. 563, 569, 48 L. ed. 860. The court said, 161 U. S. 605, 606, 16 Sup. Ct. 650, 40 L. ed. 824, "If the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. . . . The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. . . . If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that if it also tends to incriminate, but at the same time

fied voluntarily, thereby waiving his constitutional privilege, he may be fully cross-examined as to the testimony which he has given.⁵¹

While, as a general rule, a defendant may not be obliged to produce his books to furnish evidence against himself, the Amendment does not protect him against their production;⁵² and a bankrupt may not refuse to surrender his books to the receiver;⁵³ nor may the officer of a corporation refuse to produce in court its books in his possession upon the ground that they would incriminate him;⁵⁴ and he may be required to produce such books and (in view of the protection afforded by the immunity statute to himself in such case) to testify, although the

operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other."—The statute does not protect a witness whose testimony may be required by reason of it from prosecution for crimes with which the matters testified about were only remotely connected: *Heike v. United States* (1913) 227 U. S. 131, 33 Sup. Ct. 226, 57 L. ed. 450. And the statute does not protect one testifying under it from prosecution for perjury while so testifying: *Glickstein v. United States* (1911) 222 U. S. 139, 32 Sup. Ct. 71, 56 L. ed. 128.

⁵¹ *Powers v. United States* (1912) 223 U. S. 303, 32 Sup. Ct. 281, 56 L. ed. 448; *Sawyer v. United States* (1906) 202 U. S. 150, 26 Sup. Ct. 575, 50 L. ed. 972.

⁵² *Johnson v. United States* (1913) 228 U. S. 457, 33 Sup. Ct. 572, 57 L. ed. 919. See also *Wigmore on Evidence*, p. 3126. Compare *People ex rel. Ferguson v. Reardon* (1908) 124 N. Y. App. Div. 818, 109 N. Y. Supp. 504.

⁵³ *In the Matter of George Harris* (1911) 221 U. S. 274, 31 Sup. Ct. 557, 55 L. ed. 732.

⁵⁴ *Wilson v. United States* (1911) 221 U. S. 361, 31 Sup. Ct. 538, 55 L. ed. 771; *Dreier v. United States* (1911) 221 U. S. 394, 31 Sup. Ct. 550, 55 L. ed. 784; *Baltimore & O. R. Co. v. Interstate Com. Comn.* (1911) 221 U. S. 612, 31 Sup. Ct. 621, 55 L. ed. 878; *Wheeler v. United States* (1913) 226 U. S. 478, 33 Sup. Ct. 158, 57 L. ed. 309. See also *Grant v. United States* (1913) 227 U. S. 74, 33 Sup. Ct. 190, 57 L. ed. 423; *Heike v. United States* (1913) 227 U. S. 131, 143, 33 Sup. Ct. 226, 228, 57 L. ed. 450.

production of those books and his testimony may incriminate the corporation.⁵⁵

Unreasonable searches and seizures.

213. The Fourth Amendment, which, like the rest of the first ten Amendments, relates only to the federal government, declares that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The court has held ⁵⁶ that this provision also renders unconstitutional the act of Congress which we have already noted ⁵⁷ which authorized a court to require a defendant in revenue cases to produce his papers under penalty of admitting the truth of the statements of the attorney for the government as to what those papers would prove if produced. But "subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories and performing different functions;" ⁵⁸ and hold that "the search and seizure clause of the Fourth Amendment was not intended to interfere

⁵⁵ *Hale v. Henkel* (1906) 201 U. S. 43, 26 Sup. Ct. 370, 50 L. ed. 652; *McAlister v. Henkel* (1906) 201 U. S. 90, 26 Sup. Ct. 385, 50 L. ed. 671; *Nelson v. United States* (1906) 201 U. S. 92, 26 Sup. Ct. 358, 50 L. ed. 673. See also *Wilson v. United States* (1911) 221 U. S. 361, 384, 31 Sup. Ct. 538, 546, 55 L. ed. 771. Compare *Proskauer, Corporate Privilege Against Self Incrimination*, 11 Col. L. Rev. 445.

⁵⁶ *Boyd v. United States* (1886) 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746.

⁵⁷ Sec. 212, *supra*.

⁵⁸ *Hale v. Henkel* (1906) 201 U. S. 43, 72, 26 Sup. Ct. 370, 378, 50 L. ed. 652. See also *Wigmore on Evidence*, pp. 3126, 3127, vol. V, p. 230; *Fitzgerald, John Wilkes*, chapter 6.

with the power of courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence."⁵⁹

Other testimony.

214. The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." If witnesses for the prosecution have died, testimony given by those witnesses at a previous trial on the same issue is admissible;⁶⁰ but their evidence is not admissible when their absence is due to negligence of officers of the government⁶¹ but in a trial for receiving stolen property, the record of the conviction of the thief cannot be admitted in evidence to prove the theft.⁶²

Punishment.

215. The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This Amendment clearly applies only to state action;⁶³

⁵⁹ *Hale v. Henkel* (1906) 201 U. S. 43, 73, 26 Sup. Ct. 370, 378, 50 L. ed. 652. See also *Grant v. United States* (1913) 227 U. S. 74, 33 Sup. Ct. 190, 57 L. ed. 423; *Wheeler v. United States* (1913) 226 U. S. 478, 33 Sup. Ct. 158, 57 L. ed. 309; *Wilson v. United States* (1911) 221 U. S. 361, 31 Sup. Ct. 538, 55 L. ed. 771; and other cases cited in notes 54, 55, *supra*.

⁶⁰ *Mattox v. United States* (1895) 156 U. S. 237, 15 Sup. Ct. 337, 39 L. ed. 409.

⁶¹ *Motes v. United States* (1900) 178 U. S. 458, 20 Sup. Ct. 993, 44 L. ed. 1150.

⁶² *Kirby v. United States* (1899) 174 U. S. 47, 19 Sup. Ct. 574, 43 L. ed. 890.—On this Amendment in general see also Patterson, *The United States and the States Under the Constitution*, 2d ed., p. 254.

⁶³ *O'Neil v. Vermont* (1892) 144 U. S. 323, 12 Sup. Ct. 693, 36 L. ed. 450.

but we have already seen ⁶⁴ that the court has declared unconstitutional under the equal protection provision of the Fourteenth Amendment a statute which imposed upon railroads and railroad employees who should exact higher rates than were ordained by the state penalties which would be so large in the aggregate that the railroads and their employees would comply with the statutes and orders relating to rates rather than contest the validity of the rates in actions at law.

A provision prohibiting excessive fines and cruel and unusual punishments also appears in the Philippine bill of rights, and under it the court has declared invalid a section of the penal code of the islands and a sentence pronounced under it which imposed upon an officer of the government for making false entries in public records as to payments of six hundred and twelve pesos a fine of four thousand pesos and cadena temporal for twelve years, with accessories including the carrying of chains, perpetual disqualification from holding public office and perpetual surveillance.⁶⁵

DECISION OF CONSTITUTIONAL QUESTIONS.

Questions which may be brought before the court.

216. As the court has no power to declare a statute invalid unless it clearly violates a provision of the Constitution,⁶⁶ such questions as whether a statute violates natural justice or kindred principles may not properly be

⁶⁴ Sec. 145, *supra*.

⁶⁵ *Weems v. United States* (1910) 217 U. S. 349, 30 Sup. Ct. 544, 54 L. ed. 793. See 217 U. S. at 366, 367, 382, 30 Sup. Ct. at 548, 549, 555, 54 L. ed. at 798, 799, 805. Compare *Schofield, Cruel and Unusual Punishment*, 5 Ill. L. Rev. 321.

⁶⁶ See secs. 94, *supra*, and 217, *infra*.

considered by the court.⁶⁷ Moreover, it is an established principle that if a state court has decided that a state statute or the action of an organ of state government is in accord with the state constitution that decision cannot be reviewed by the Supreme Court.⁶⁸

The court also refuses to pass upon a constitutional question unless its solution is necessary for the decision of an actual case then before the court.⁶⁹ In determining the constitutionality of a statute the court considers only so much of the statute as applies in that particular case.⁷⁰

⁶⁷ See secs. 98-103, 113, *supra*.

⁶⁸ Sec. 63, *supra*.

⁶⁹ *Hampton v. St. Louis, I. M. & S. Ry. Co.* (1913) 227 U. S. 456, 468, 33 Sup. Ct. 263, 267, 57 L. ed. 596, and cases there cited; *Grenada L. Co. v. Mississippi* (1910) 217 U. S. 433, 30 Sup. Ct. 535, 54 L. ed. 826; *Wood v. Chesborough* (1913) 228 U. S. 672, 33 Sup. Ct. 706, 57 L. ed. 1018; *Adams v. Russell* (1913) 229 U. S. 353, 33 Sup. Ct. 846, 57 L. ed. 1224; authorities in note 75, *infra*; Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 135-137, reprinted in Thayer, *Legal Essays*, 8-10; McClain, *Constitutional Law in the United States*, 19 *et seq.*; Willoughby on the Constitution, pp. 13, 14; Patterson, *The United States and the States Under the Constitution*, 2d ed., p. 228; Black, *Constitutional Law*, 3d ed., pp. 63, 65. In *Chicago & G. T. Ry. Co. v. Wellman* (1892) 143 U. S. 339, 345, 12 Sup. Ct. 400, 402, 30 L. ed. 176, the court said, "Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." The same question is discussed at much greater length in *Muskat v. United States* (1911) 219 U. S. 346, 31 Sup. Ct. 250, 55 L. ed. 246.

⁷⁰ *Grenada L. Co. v. Mississippi* (1910) 217 U. S. 433, 30 Sup. Ct. 535, 54 L. ed. 826; *Southwestern Oil Co. v. Texas* (1910) 217 U. S. 114, 30 Sup. Ct. 496, 54 L. ed. 688; *United States v. Delaware & H. Co.* (1909) 213 U. S. 366, 29 Sup. Ct. 527, 53 L. ed. 836. And see *Chesapeake & O. Ry. Co. v. Conley* (1913) 230 U. S. 513, 33 Sup. Ct. 985, 57 L. ed. 1597.

If the constitutional provision which is invoked was not intended primarily for the protection of the party before the court, the court will not inquire into the validity of the governmental action.⁷¹ So also if it appears that the controversy in issue has been settled the case will be dismissed.⁷² And in a case coming from a state court the Supreme Court will not pass upon a constitutional question unless it has been raised in the court below as required by the judiciary act.⁷³

We have already examined at sufficient length the question whether a party may estop itself from contesting the

⁷¹ *Darnell v. Indiana* (1912) 226 U. S. 390, 398, 33 Sup. Ct. 120, 57 L. ed. 267; *Hampton v. St. Louis, I. M. & S. Ry. Co.* (1913) 227 U. S. 456, 468, 33 Sup. Ct. 263, 267, 57 L. ed. 596; *Interstate Com. Comn. v. Chicago, R. I. & P. Ry. Co.* (1910) 218 U. S. 88, 30 Sup. Ct. 651, 54 L. ed. 946; *Citizens Nat. Bk. v. Kentucky* (1910) 217 U. S. 443, 30 Sup. Ct. 532, 54 L. ed. 832; *Grenada L. Co. v. Mississippi* (1910) 217 U. S. 433, 30 Sup. Ct. 535, 54 L. ed. 826; *Smith v. Indiana* (1903) 191 U. S. 138, 24 Sup. Ct. 51, 48 L. ed. 125; *Berea College v. Kentucky* (1908) 211 U. S. 45, 29 Sup. Ct. 33, 53 L. ed. 81; *United States v. Chandler-Dunbar Co.* (1913) 229 U. S. 53, 73, 74, 33 Sup. Ct. 667, 676, 57 L. ed. 1063; *Patterson, The United States and the States Under the Constitution*, 2d ed., p. 228; *Black, Constitutional Law*, 3d ed., pp. 63, 65.

⁷² *United States v. Evans* (1909) 213 U. S. 297, 29 Sup. Ct. 507, 53 L. ed. 803; *Fisher v. Baker* (1906) 203 U. S. 174, 27 Sup. Ct. 135, 51 L. ed. 142; *American B. Co. v. Kansas* (1904) 193 U. S. 49, 23 Sup. Ct. 394, 48 L. ed. 613. See also *Muskraat v. United States* (1911) 219 U. S. 346, 31 Sup. Ct. 250, 55 L. ed. 246. Where, however, any liability remains the question cannot be treated as a moot one: *Southern P. Co. v. Interstate Com. Comn.* (1911) 219 U. S. 433, 31 Sup. Ct. 288, 55 L. ed. 283. See also *Southern P. T. Co. v. Interstate Com. Comn.* (1911) 219 U. S. 498, 31 Sup. Ct. 279, 55 L. ed. 310.

⁷³ Act Mar. 3, 1911, sec. 237. See *In the Matter of Spencer* (1913) 228 U. S. 652, 33 Sup. Ct. 709, 57 L. ed. 1010; *Thomas v. Iowa* (1908) 209 U. S. 258, 28 Sup. Ct. 487, 52 L. ed. 782; *Walker v. Sauvinet* (1875) 92 U. S. 90, 93, 23 L. ed. 678; 42 Am. L. Rev. 645-647; and also *Mackay v. Uinta D. Co.* (1913) 229 U. S. 173, 33 Sup. Ct. 638, 57 L. ed. 1138; *Dill v. Ebey* (1913) 229 U. S. 199, 33 Sup. Ct. 620, 57 L. ed. 1148. Compare *Weems v. United States* (1910) 217 U. S. 349, 362, 30 Sup. Ct. 544, 547, 54 L. ed. 793.

validity of a statute under which that party has acted.⁷⁴

Rules of construction.

217. In a number of cases the court has taken the position that "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."⁷⁵ And this position is unquestionably sound. It is true that in recent years with increasing frequency the court has declared legislation unconstitutional without showing clearly the connection between its conclusion and the words of the Constitution upon which that conclusion was said to be based.⁷⁶ It is true that state and lower federal courts have declared legislation unconstitutional with even greater freedom. But such a tendency cannot continue. It is causing a widespread distrust of the courts, and that distrust is

⁷⁴ Sec. 22, *supra*. Consider also *Los Angeles v. Los Angeles C. W. Co.* (1900) 177 U. S. 558, 20 Sup. Ct. 736, 44 L. ed. 886; *Covington & L. T. R. Co. v. Sandford* (1896) 164 U. S. 578, 17 Sup. Ct. 198, 41 L. ed. 560; *Allen v. St. Louis, I. M. & S. Ry. Co.* (1913) 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. ed. 1625; *Missouri Rate Cases—Knott v. Chicago, B. & Q. R. Co.* (1913) 230 U. S. 474, 33 Sup. Ct. 975, 57 L. ed. 1571.

⁷⁵ *Sinking Fund Cases* (1878) 99 U. S. 700, 718, 25 L. ed. 496. See also authorities cited in sec. 94, *supra*.—Where two interpretations of a statute are admissible, under one of which the statute is constitutional and under the other of which it is unconstitutional, the former interpretation of the statute must be adopted: *The Abby Dodge* (1912) 223 U. S. 166, 175, 32 Sup. Ct. 310, 312, 56 L. ed. 390; *United States v. Delaware & H. Co.* (1909) 213 U. S. 366, 407, 29 Sup. Ct. 527, 535, 53 L. ed. 836; *Harriman v. Interstate Com. Comn.* (1908) 211 U. S. 407, 29 Sup. Ct. 115, 53 L. ed. 253; *Knights T. I. Co. v. Jarman* (1902) 187 U. S. 197, 23 Sup. Ct. 108, 47 L. ed. 139. Compare *James v. Bowman* (1903) 190 U. S. 127, 23 Sup. Ct. 678, 47 L. ed. 979; and the language of White, J., in *Employers' Liability Cases—Howard v. Illinois C. R. Co.* (1908) 207 U. S. 463, 501, 28 Sup. Ct. 141, 146, 52 L. ed. 297. The court follows the interpretation of a state statute which has been adopted by the state court: *Portland Ry., L. & P. Co. v. Railroad Comn. of Oregon* (1913) 229 U. S. 397, 33 Sup. Ct. 827, 57 L. ed. 1248; and see note 47 in Chapter 3, *supra*.

⁷⁶ See especially Chapters 3 and 4, *supra*.

growing;⁷⁷ so that unless the courts when they overturn the will of the majority conform to the rule which they have themselves recognized⁷⁸ and show clearly that such decisions are required by the Constitution itself, that majority will before long take pains to secure the observance by the courts of the constitutional limits to judicial authority.⁷⁹

Where technical terms are used in the Constitution it is the duty of the court to interpret those terms in accordance with their technical meanings.⁸⁰ Thus, where a term of the common law is used it is to be given the same meaning as it had at common law.⁸¹

The history of a provision⁸² and its context⁸³ often go far towards showing its meaning; and the fact that under a particular interpretation another clause of the Constitution would be superfluous certainly tends to show that that interpretation is incorrect,⁸⁴ although it is not conclusive upon that point.⁸⁵

The antecedent history of the country and the state of

⁷⁷ See, for example, in Chapter 4, notes 58, 118, and ends of notes 80, 207, 212; in Chapter 3, notes 61, 62, 73; article 21 Yale L. J. 117; language of Harlan, J., reported in 68 Legal Intelligencer, p. 318, col. 4.

⁷⁸ See note 75, *supra*.

⁷⁹ See note 116 in Chapter 4, *supra*.

⁸⁰ The term "admiralty" has, however, been given a broader meaning than it had before the adoption of the Federal Constitution: see Patterson, *The United States and the States Under the Constitution*, 2d ed., pp. 208, 209.

⁸¹ See *Schick v. United States* (1904) 195 U. S. 65, 69, 24 Sup. Ct. 826, 827, 49 L. ed. 99, where the authorities are collected, and also *South Carolina v. United States* (1905) 199 U. S. 437, 449, 450, 26 Sup. Ct. 110, 111, 112, 50 L. ed. 261. Compare sec. 83, *supra*.

⁸² See note 86, *infra*; and secs. 75-81, 128, 131, *supra*. Compare, e. g., Wigmore, *Evidence*, p. 3126, V, 230.

⁸³ See secs. 127, 2, 74, *supra*.

⁸⁴ See sec. 126, *supra*. Compare sec. 146, *supra*.

⁸⁵ See sec. 88, *supra*.

public affairs at the time of the adoption of the Constitution must be considered, in order that the old law, the mischief and the remedy may have their relative weight.⁸⁶ "No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction, equally accordant with the words and sense thereof, will enforce and protect them."⁸⁷

In case of doubt⁸⁸ as to the meaning of a provision, a contemporaneous legislative exposition acquiesced in for a long term of years fixes the construction.⁸⁹ So also, while the Federalist is not of binding authority, and was not in fact so regarded in reaching the unfortunate decision in *Chisholm v. Georgia*,⁹⁰ "The opinion of the Federalist has always been considered as of great authority."⁹¹

⁸⁶ *Prigg v. Pennsylvania* (1842) 16 Pet. 539, 611, 612, 10 L. ed. 1060; *Patterson, The United States and the States Under the Constitution*, 2d ed., p. 234; *Maxwell v. Dow* (1900) 176 U. S. 581, 602, 20 Sup. Ct. 448, 494, 456, 44 L. ed. 597; *Rhode Island v. Massachusetts* (1838) 12 Pet. 657, 9 L. ed. 1233. See also sec. 74, *supra*; and sec. 55, note, *supra*.

⁸⁷ *Prigg v. Pennsylvania* (1842) 16 Pet. 539, 612, 10 L. ed. 1060.

⁸⁸ On this limitation to the statement see authorities collected in *Fairbank v. United States* (1901) 181 U. S. 283, 308 et seq., 21 Sup. Ct. 648, 658 et seq., 45 L. ed. 862.

⁸⁹ See authorities collected in *Fairbank v. United States*, cited in note 88, *supra*; language of Brown, J., in *Downes v. Bidwell* (1901) 182 U. S. 244, 249, 21 Sup. Ct. 770, 772, 45 L. ed. 1088; and also *Degge v. Hitchcock* (1913) 229 U. S. 162, 33 Sup. Ct. 639, 57 L. ed. 1135.

⁹⁰ (1793) 2 Dall. 419, 1 L. ed. 440. See sec. 204, *supra*.

⁹¹ *Cohens v. Virginia* (1821) 6 Wheat. 264, 418, 5 L. ed. 257. On the debates in the Convention of 1787 see also *United States v. Union P. R. Co.* (1875) 91 U. S. 72, 79, 23 L. ed. 224; *McCulloch v. Maryland* (1819) 4 Wheat. 316, 404, 4 L. ed. 579; *Maxwell v. Dow* (1900) 176 U. S. 581, 601, 602, 20 Sup. Ct. 448, 494, 456, 44 L. ed. 597; *Patterson, The United States and the States Under the Constitution*, 2d ed., pp. 236, 237; Brown, J., in *Downes v. Bidwell* (1901) 182 U. S. 244, 254, 21 Sup. Ct. 770, 774, 45 L. ed. 1088. And see *Pennsylvania R. Co. v. International C. M. Co.* (1913) 230 U. S. 184, 33 Sup. Ct. 893, 57 L. ed. 1446; *Omaha & C. B. S. Ry. Co. v. Interstate Com. Comm.* (1913) 230 U. S. 324, 33 Sup. Ct. 890, 57 L. ed. 1501.

The court, however, does not always interpret stringently the limitations upon state action which are contained in the Federal Constitution. It recognizes the fact that it cannot carry out a constitution with mathematical nicety to logical extremes;⁹² and it does not make extreme interpretations in order to set aside state action which does not appear to the court to be unreasonable.

Partial unconstitutionality.

218. Even where a statute is in part unconstitutional, if such part may be eliminated and yet leave a statute so far complete that the court may believe that the legislature would have enacted the statute even without the part which is unconstitutional, that remainder of the statute may be enforced.⁹³ But where the unconstitutional features of the statute are so far connected with its general scope that without them the court cannot give effect to the real purpose for which the statute was enacted the statute is unenforceable.⁹⁴ The court cannot reshape a

⁹² See secs. 110, 139, note, 140, note, 101, *supra*.

⁹³ *Southern P. Co. v. Campbell* (1913) 230 U. S. 537, 33 Sup. Ct. 1027, 57 L. ed. 1610; *Kentucky U. Co. v. Kentucky* (1911) 219 U. S. 140, 31 Sup. Ct. 171, 55 L. ed. 82; *Berea College v. Kentucky* (1908) 211 U. S. 45, 29 Sup. Ct. 33, 53 L. ed. 81; *Pollock v. Farmers' L. & T. Co.* (1895) 158 U. S. 601, 15 Sup. Ct. 912, 39 L. ed. 1108; *Presser v. Illinois* (1886) 116 U. S. 252, 6 Sup. Ct. 580, 29 L. ed. 615; *Packet Co. v. Keokuk* (1877) 95 U. S. 80, 24 L. ed. 377. See also *Minnesota Rate Cases—Simpson v. Shepard* (1913) 230 U. S. 352, 380, 381, 33 Sup. Ct. 729, 732, 733, 57 L. ed. 1511.

⁹⁴ *International T. Co. v. Pigg* (1910) 217 U. S. 91, 30 Sup. Ct. 481, 54 L. ed. 678; *Employers' Liability Cases—Howard v. Illinois C. R. Co.* (1908) 207 U. S. 463, 28 Sup. Ct. 141, 52 L. ed. 297; *Pollock v. Farmers' L. & T. Co.* (1895) 158 U. S. 601, 15 Sup. Ct. 912, 39 L. ed. 1108; *Baldwin v. Franks* (1887) 120 U. S. 678, 7 Sup. Ct. 656, 763, 30 L. ed. 766; *Sprague v. Thompson* (1886) 118 U. S. 90, 6 Sup. Ct. 988, 30 L. ed. 115; *Virginia Coupon Cases—Poindexter v. Greenhow* (1885) 114 U. S. 270, 5 Sup. Ct. 903, 29 L. ed. 185; *Allen v. Louisiana* (1880) 103 U. S. 80, 26 L. ed. 318; *Trade Mark Cases* (1879) 100 U. S. 82, 25 L. ed. 550; *Black, Constitutional Law*, 3d ed., p. 73.

statute which is unconstitutional into one which is constitutional simply because the legislature might constitutionally have dealt with some of the subjects which are included in that statute.⁹⁵

There are also a number of other cases, to which we have already referred,⁹⁶ in which the court has decided that a statute which limited the rate of charges could not, because of economic conditions, be enforced at one time, although the statute might later, through a change in economic conditions, become enforceable, or in which the court has sustained the enforcement of a statute without prejudice to the right of the complainant to reopen the case if experience should prove the operation of the statute to be confiscatory.⁹⁷ The mere fact that a statute itself is constitutional does not oust the court of jurisdiction to restrain unconstitutional applications of that statute.⁹⁸ And even where a statute may be properly en-

⁹⁵ *Butts v. Merchants & M. T. Co.* (1913) 230 U. S. 126, 33 Sup. Ct. 964, 57 L. ed. 1422; *Meyer v. Wells, Fargo & Co.* (1912) 223 U. S. 298, 32 Sup. Ct. 218, 56 L. ed. 445; *James v. Bowman* (1903) 190 U. S. 127, 23 Sup. Ct. 678, 47 L. ed. 979; *Trade Mark Cases* (1879) 100 U. S. 82, 25 L. ed. 550; *United States v. Reese* (1875) 92 U. S. 214, 23 L. ed. 563. See also *Siler v. Louisville & N. R. Co.* (1909) 213 U. S. 175, 29 Sup. Ct. 451, 53 L. ed. 753. Compare *El Paso & N. E. Ry. Co. v. Gutierrez* (1909) 215 U. S. 87, 30 Sup. Ct. 21, 54 L. ed. 106, with *Employers' Liability Cases*—*Howard v. Illinois C. R. Co.* (1908) 207 U. S. 463, 28 Sup. Ct. 141, 52 L. ed. 497.

⁹⁶ Sec. 179, *supra*.

⁹⁷ See *Missouri Rate Cases*—*Knott v. Chicago, B. & Q. R. Co.* (1913) 230 U. S. 474, 508, 33 Sup. Ct. 975, 983, 57 L. ed. 1571; *Minnesota Rate Cases*—*Simpson v. Shepard* (1913) 230 U. S. 352, 473, 33 Sup. Ct. 729, 769, 57 L. ed. 1511; *Northern P. Ry. Co. v. North Dakota* (1910) 216 U. S. 579, 30 Sup. Ct. 423, 54 L. ed. 624; *Willcox v. Consolidated G. Co.* (1909) 212 U. S. 19, 29 Sup. Ct. 192, 53 L. ed. 382; *Knoxville v. Knoxville W. Co.* (1909) 212 U. S. 1, 29 Sup. Ct. 148, 53 L. ed. 371; and also *Allen v. St. Louis, I. M. & S. Ry. Co.* (1913) 230 U. S. 553, 33 Sup. Ct. 1030, 57 L. ed. 1625.

⁹⁸ *Reagan v. Farmers' L. & T. Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. ed. 1014.

forced against some roads it may at the same time be unenforceable as against other roads.⁹⁹

⁹⁹ See, e. g., *Missouri Rate Cases*—*Knott v. Chicago, B. & Q. R. Co.* (1913) 230 U. S. 474, 33 Sup. Ct. 975, 57 L. ed. 1571; *Minnesota Rate Cases*—*Simpson v. Shepard* (1913) 230 U. S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511; *St. Louis & S. F. R. Co. v. Hadley* (1909) 168 Fed. 317.

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